Langston Companies, Inc. *and* Furniture Workers Division I.U.E., Local 282 AFL–CIO. Cases 26–CA–12392, 26–CA–12809, 26–CA–12926, 26–CA–12980, 26–CA–13035, 26–CA–13115, and 26–CA–13394

September 23, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On May 14, 1990, Administrative Law Judge Robert W. Leiner issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

For the reasons set forth fully in the judge's decision, we agree that the General Counsel had failed to prove that the Respondent violated Section 8(a)(3) of the Act by refusing to offer half-bag department employees Shirley Teamer and Rosie Nabors the opportunity to work overtime on October 10, 1987. The General Counsel's theory of violation is that the Respondent singled out these two employees because of their leadership role in the Union's organizing campaign. The Respondent rebutted a key element of the General Counsel's prima facie case by proving that, at the time of its overtime assignment, it did not know that Teamer and Nabors were more active in the campaign than the other half-bag employees, all of whom openly displayed union insignia at work. Moreover, after the Respondent did become aware of the union leadership roles of Nabors and Teamer, it promoted the former in September 1988 and excepted the latter from a 1-day layoff in February 1989.

Our dissenting colleague would reverse the judge based on precedent holding that the failure of an employer to include all known union supporters in an adverse action does not preclude finding unlawful motivation behind such action. Under that precedent, the fact that an employer takes action against only some of the union adherents does not necessarily show that the employer's action was lawful. However, in such cases, as in any 8(a)(3) case, the General Counsel must establish that the action was for an unlawful reason. In the instant case, the General Counsel sought to show that the Respondent's motive was to punish Teamer and Nabors because they were more active than their coemployees in supporting the Union. The General Counsel's case foundered because there was no company knowledge of the greater union activity of Teamer and Nabors. Thus, a critical element of the General Counsel's prima facie case—knowledge—was missing.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Langston Companies, Inc., Arlington, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(d) and reletter the subsequent paragraphs.

''(d) Make whole its employees for any losses they may have suffered by reason of the Respondent's unilateral implementation of changes in its insurance plan.''

2. Substitute the attached notice for that of the administrative law judge.

MEMBER DEVANEY, concurring in part and dissenting in part.

Contrary to my colleagues, I would reverse the judge and find that the Respondent violated Section 8(a)(3) and (1) by denying ovetime work to employees Teamer and Nabors on October 10, 1987.[1] Teamer and

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's findings that the Respondent committed numerous violations of Sec. 8(a)(5), (3), and (1).

[2] We affirm the judge's conclusion that the Respondent did not violate Sec. 8(a)(3) by transferring the half-bag manufacturing operation from its Arlington plant to its Memphis plant. In light of the limited nature of the General Counsel's exceptions, we also agree with the judge that the Respondent did not violate Sec. 8(a)(5) by failing to bargain about the half-bag transfer decision and by refusing to provide the Union with requested information about that decision. In exceptions, the General Counsel relies exclusively on the theory that the Respondent had an obligation to bargain because it relocated the half-bag work for the unlawful discriminatory purpose of undermining the Union. See *Strawsine Mfg. Co.*, 280 NLRB 553 (1986). The General Counsel does not contend in exceptions that, assuming the Respondent transferred work for valid economic reasons, it had an obligation to bargain under *Otis Elevator Co.*, 269 NLRB 891 (1984), and related precedent. We therefore find it unnecessary to rely on the judge's discussion of whether the Respondent had an obligation to bargain under Otis and related precedent. In *Dubuque Packing Co.*, 303 NLRB 403 (1991), the Board overruled *Otis* and articulated a new test for determining whether bargaining is required over an employer's relocation decision. We therefore do not rely on the judge's discussion of whether the Respondent had an obligation to bargain under *Otis* and related precedent. In light of the narrow basis for the General Counsel's exceptions, we find no need to apply the *Dubuque* test.

[3] In accord with the General Counsel's exceptions, we shall order the Respondent to make the employees whole, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), for any losses they may have suffered by reason of the Respondent's unilateral implementation of changes in their insurance plan.

[4] In view of the absence of a prima facie case, it is unnecessary to assess the plausibility of the reasons given by Respondent for its failure to offer the work to Teamer and Nabors after the other employees declined it.

[1] I agree with my colleagues' disposition of all other issues in this case.

Nabors initiated the organizing effort at the Respondent's Arlington, Tennessee plant in September 1987. They asked employees if they wanted a union, contacted a union representative, and distributed and collected authorization cards. They also distributed union literature in the plant breakroom and outside the plant. The judge found that the Respondent ''undoubtedly had knowledge of these early, overt union activities.'' Teamer and Nabors, as well as six other employees in the ''half-bag'' department, openly wore union insignia prior to October 10.

On October 7–9, the Respondent offered Saturday overtime work for October 10 to all 60 production employees except Teamer and Nabors. I agree with the judge that, based on Teamer's and Nabors' open union activity and statements by the Respondent's president showing substantial antiunion animus, the General Counsel established a prima facie case that the Respondent's failure to offer the ovetime work to Teamer and Nabors violated Section 8(a)(3) and (1).

I disagree, however, with the judge's conclusion, which my colleagues adopt, that the General Counsel's prima facie case was rebutted by his failure to show that the Respondent knew that Teamer and Nabors were not just open union proponents but the instigators of the organizing effort. The judge reasoned that, because other known union adherents were offered the overtime work, the Respondent's failure to offer it to Teamer and Nabors was not shown to have an antiunion motive. This conclusion is contrary to the established principle that an employer's failure to take action detrimental to all known union adherents does not show that its action against some was not for antiunion reasons. See, e.g., *Alliance Rubber Co.*, 286 NLRB 645, 647 (1987); *Master Security Services*, 270 NLRB 543, 552 (1984).[2]

Moreover, neither the judge nor my colleagues address the Respondent's failure to offer the overtime work to Teamer and Nabors after other employees declined the overtime work. The Respondent explained that it did not offer the work to Teamer and Nabors because their work stations were not located as conveniently as others to the location where the work was to be performed.[3] This explanation, however, does not justify the Respondent's failure to offer the work to Teamer and Nabors after others had declined the work.[4] Indeed, the judge found that Teamer and Nabors were capable of performing the work. Thus, given the Respondent' knowledge of Teamer's and Nabors' active union support, the Respondent's demonstrated antiunion animus, the timing of the denial of overtime shortly after Teamer's and Nabors' initiation of the union campaign, and the absence of any proffered reason for not offering the overtime work to Teamer and Nabors after it was declined by others, I would find that the Respondent' failure to offer to Teamer and Nabors the overtime work that the rest of the 60-employee complement had been invited to perform clearly violated Section 8(a)(3) and (1) of the Act.

[2] Nor do I agree with my colleagues that the Respondent's knowledge of Teamer's and Nabors' leadership role in the organizing campaign was an essential element of the violation. The complaint alleged that the Respondent violated Sec. 8(a)(1) and (3) by refusing to permit Teamer and Nabors to work overtime ''because they joined, supported or assisted the Union . . . .'' Although the General Counsel established all the standard elements necessary to prove this violation, my colleagues find this insufficient. Rather, they find that the General Counsel saddled himself with an additional element of proof, which in their view he failed to show, merely by his statement in his brief to the judge that Teamer and Nabors were denied overtime because of their leadership in the campaign.

Contrary to my colleagues, I would find the alleged violation, which is clearly established here, even assuming that the General Counsel failed to prove the Respondent's knowledge of Teamer's and Nabors' leadership role in the campaign (see fn. 3, below). The violation made out in the record does not differ from that alleged in the complaint, nor does it differ significantly from that which the General Counsel contended to the judge. My colleagues have seized on an inconsequential discrepancy between the General Counsel's argument and his proof in order to dismiss this complaint allegation.

Moreover, to show the Respondent's lack of hostile motive against Teamer and Nabors, my colleagues cite the Respondent's promotion of Teamer in September 1988 and its excepting Nabors from 1-day layoff in February 1989. The former occurred almost a year after the organizing capaign and the denial of overtime at issue here, while the latter occurred even longer after these events. The Respondent's apparent lack of hostility toward Teamer and Nabors at that time shows little, if anything, about the motive for the Respondent's denial of overtime to Teamer and Nabors in October 1987.

[3] The less than compelling explanation for singling out the two leading union proponents as the only employees not to be offered overtime tends to support the General Counsel's contention that, contrary to the judge, the Respondent had knowledge that Teamer and Nabors were the instigators of the organizing activity. It is not necessary to pass on this issue, however, in order to find the denial of overtime to them violated the Act.

[4] The Respondent's argument that its witnesses were not asked to explain the Respondent's failure to offer the overtime to Teamer and Nabors after others had declined the work is unavailing. The burden is on the Respondent to prove that it had a legitimate business reason for its actions. *Wright Line*, 251 NLRB 1083, 1088 fn. 11 (1980), and accompanying text.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT unilaterally implement any substance abuse plan, wage rate, insurance plan or any other term or condition of employment which is a mandatory subject of bargaining without having first reached a lawful impasse with Furniture Workers Division, I.U.E., Local 282, AFL–CIO, with respect to bargaining in the unit below described; nor refuse to meet with the Union at reasonable times for the purpose of collective bargaining; nor withdraw or repudiate our agreement on holidays reached in collective bargaining with the Union, or on any other mandatory term or condition of employment; nor insist on the unilateral right, with regard

to any employee insurance plan, to change the carrier, claims procedures or policy coverage; nor refuse to bargain on the Union's offer of dues-checkoff provision on any irrelevant ground; nor engage in bad-faith and surface bargaining, rather than making a sincere effort to reach an agreement with the Union.

The unit for collective bargaining is:

> All production and maintenance employees employed at Langston Companies, Inc., Arlington, Tennessee facility but excluding all truckdrivers, office and plant clerical employees, watchmen, guards and supervisors as defined in the Act.

WE WILL NOT issue reprimands to, suspend, or otherwise discriminate or retaliate against Josephine Benson, or any other employee, because she or they engage in activities on behalf of the Union, or any other labor organization, or engage in concerted activities protected by Section 7 of the Act.

WE WILL NOT fail or refuse to provide the Union, in writing, with requested information regarding (a) the identities of employees and rates of pay of newly hired employees paid higher pay rates under our interim pay plan implemented in June 1989; and (b) whether we have implemented and enforced the substance abuse plan in any of our nonunion plants; and if not, why we are proposing such plan at the Arlington, Tennessee plant.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole Josephine Benson for any loss of earnings that she may have suffered as a result of our unlawful discrimination against her in the suspension of November 22, 1988.

WE WILL rescind our written warning of November 15, 1988, and expunge from our records all memoranda of, or reference thereto, as well as our unlawful suspension of Josephine Benson on November 22, 1988, and notify Josephine Benson, in writing, that these actions have been done and that evidence of these unlawful actions will not be used as a basis for future personnel actions against her.

WE WILL, at the request of the Union, rescind (1) the employee insurance plan implemented in January 1989, and any additions or modifications thereto; (2) the interim pay plan implemented in June 1989; and (3) the substance abuse plan.

WE WILL make whole our employees for any losses which they may have suffered by reason of our unilateral implementation of changes in our insurance plan.

WE WILL, on request, bargain collectively and in good faith concerning rates of pay, hours of employment, and other terms and conditions of employment with the above named Union, as the exclusive representative of our employees in the above-appropriate unit and, if agreement is reached, embody same in a signed agreement.

LANGSTON COMPANIES, INC.

William D. Levy, Esq., for the General Counsel.
John P. Scruggs, Esq., and *Richard H. Allen Jr., Esq. (Allen, Scruggs, Sossaman & Thompson, P.C.)*, of Memphis, Tennessee, for the Respondent.
Willie Rudd, President, and *Ida Leachman*, Vice President, Local 282, Furniture Workers Division, for the Union.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge. This consolidated matter was heard on nine occasions on and between April 24 and May 25, and thereafter on November 27 and 28, 1989, in Memphis, Tennessee upon General Counsel's several complaints alleging in substance, that Respondent, Langston Companies, Inc., in its dealings with the above-captioned Local 282 (the Union), and with its employees, violated Section 8(a)(1), (3), and (5) of the Act in the period 1988 through 1989.[1]

At the hearings, all parties were represented by counsel, given full opportunity to call and examine witnesses, submit

[1] The relevant docket entries concerning the pleadings are as follows:

The charge in Case 26–CA–12392 was filed and served on November 10, 1987; the amended charge therein, filed and served December 11, 1987.

A settlement agreement executed by the parties on March 9, 1988, resolving this charge was set aside by the Regional Director, Region 26, on October 28, 1988 (see G.C. Exh. 1(j)). The Charge in Case 26–CA–12809, was filed August 31, 1988, served on September 1, 1988, with an amended charge therein, filed on October 27, 1988, and served on October 28, 1988. On October 28, 1988, the Regional Director issued and caused to be served an order consolidating cases, consolidated complaint, and notice of hearing in Cases 26–CA–12392 and 26–CA–12809. On Novemer 14, 1988, Respondent filed its timely answer to the above consolidated complaint.

On November 25, 1988, the charge in Case 26–CA–12926 was filed and served; with a first amended charge filed January 3, 1988, and served on January 6, 1988. On January 6, 1989, the Regional Director issued and served a second order consolidating cases, second consolidated complaint and notice of hearing in Cases 26–CA–12392, 26–CA–12809, and 26–CA–12926. Respondent's timely answer to the second consolidated complaint was filed on January 20, 1989.

The charge in Case 6–CA–12980 was filed on January 5, 1989, and served on January 6, 1989. The first amended charge therein was filed and served on February 14, 1989. On February 22, 1989, the Regional Director issued a third order consolidating cases, third consolidated complaint and notice of hearing in Cases 6–CA–12392, 6–CA–12809, 6–CA–12926, and 6–CA–12980, which consolidated complaint was served on February 2, 1989. The charge in Case 26–CA–13035, filed February 15, 1989, was served on February 16, 1989, with a first amended charge therein filed and served on March 17, 1989. On March 17, 1989, the Regional Director issued and served a complaint in Case 26–CA–13035. On March 17, 1989, the Regional Director issued and served an order consolidating all the above cases. On March 27, 1989, Respondent filed its answer to the complaint in Case 26–CA–13035.

On April 7, 1989, the charge was filed in Case 26–CA-13115 and served on April 10, 1989. On April 27, 1989, the Regional Director issued complaint in Case 26–CA–13115; and on May 11, 1989, the General Counsel filed a motion to consolidate Case 26–CA–13115 with all the prior cases which motion I granted after opening of the hearing on May 16, 1989. On May 8, 1989, in the meantime, Respondent filed its answer to the complaint in Case 26–CA–13115 and did not oppose the consolidation of all the above cases. The hearing, April 24–May 25, 1989, involved the above consolidated cases.

On October 12, 1989, General Counsel issued a further complaint in Case 26–CA–13394, upon a charge filed on August 29, 1989 (served August 30, 1989), and an amended charge, filed September 15, 1989 (served September 18, 1989). Respondent filed a timely answer. The reopened hearing of November 27–28, 1989, related to the complaint in Case 26–CA–13394.

oral and written evidence, and to argue on the record. At the close of the hearings, counsel for the parties waived final argument and reserved the right to submit posthearing briefs. Counsel for the General Counsel[2] and for Respondent twice submitted timely posthearing briefs which were carefully considered.

On the entire record, including the briefs, and from my particular observation of the demeanor of the witnesses as they testified, I make the following

FINDINGS OF FACT

I. RESPONDENT AS STATUTORY EMPLOYER

Respondent admits and I find that it is a corporation with offices and places of business in Arlington and Memphis, Tennessee, and other places of business in the States of Louisiana and Arkansas, where it is engaged, inter alia, in the manufacture of bags and bagging materials. During the 12-month period ending September 30, 1988, in the course and conduct of its business operations, Respondent sold and shipped from its facilities, as above described, products, goods, and materials valued in excess of $50,000 directly from points outside the State of Tennessee; and in the same period, purchased and received at its facilities in Tennessee products, goods and materials valued in excess of $50,000 directly from points outside the state of Tennessee. Respondent concedes, and I find, that at all material times, it has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNION AS STATUTORY LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that at all material times, Furniture Workers Division, I.U.E., Local 282, AFL–CIO (the Union), has been and is a labor organization within the meaning of Section 2(5) of the Act.[3]

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent manufactures packaging materials in five plants. In West Memphis, Arkansas, it manufactures multiwall paper bags. It manufactures ''textile bags'' at its Crowley, Louisiana plant, and at its Memphis, Tennessee plant (Texas Street plant). ''Bulk bags'' (1-ton capacity bags for free-flowing food stuffs such as rice and various chemicals) are produced at the Arlington, Tennessee plant and at the Crowley, Louisiana plant. Cotton bale packaging materials are currently produced at its Memphis, Tennessee (Texas Street) plant, although, at material times, certain types of cotton bale packaging materials—''half-bags''—were produced and assembled at the Arlington, Tennessee plant (opened in 1985) in conjunction with cutting and warehousing at the Texas Street plant. Thus, at material times, part of the fabrication process for (cotton baling) ''half-bags'' was done at Arlington while other parts of the process, in 1986 and 1987, were performed at the Texas Street plant. There is no dispute that half-bag production ceased at the Arlington, Tennessee plant on or before January 15, 1988, although there was a temporary resumption of half-bag production at Arlington in September-November 1988. The Company's fifth manufacturing plant in Jackson, Mississippi producees items such as tarpaulins and wagon covers.

In September 1987, Respondent employed approximately 61 employees in production and maintenance classifications in its Arlington, Tennessee facility, engaged principally in the production, as above noted, of ''bulk bags.'' Bulk bags are not used to package cotton, rather, as above noted, they are used for free-flowing chemicals and foodstuffs. There were, however, eight employees in the Arlington facility employed in the manuacture of half bags to package cotton bales. A half bag consists of two pieces: the ''bottom'' and the ''barrel,'' both of which are made of and cut from rolls of woven 35 polypropylene. Prior to January 15, 1988, the polypropylene bottoms and barrels, cut at Texas Street, were shipped 40 miles to Arlington for sewing and assembly by the eight employees in the half-bag department in Arlington. The finished half bags were then baled in Arlington and shipped back to the Texas Street plant for warehousing and distribution. There was no substantial warehousing facility at the Arlington plant whether for half bags or bulk bags.

The eight Arlington employees engaged in half-bag hemming, sewing, assembly, and baling were Shirley Teamer, Dorothy Stewart, Josephine Benson, Justine Harwell, Rosie Nabors, Helen McBride, Cynthia Tapplin, and Cyrus Payne (the baler).

In 1986, half-bag production, performed at the Crowley, Louisiana plant, was transferred to Memphis and the newly opened Arlington plant as a ''split'' production scheme. In 1986 and through January 15, 1988, the ''bottom sheets'' of half bags were cut and printed at the Texas Street plant. There was no sewing operation on half bags at Memphis Street; sewing was done at Arlington where the bags, using bottom sheets shipped from Memphis, were cut, hemmed, sewed, inspected, baled, and then loaded for reshipment to Memphis for distribution or warehousing. At the Texas Street plant in Memphis, the half-bag operations consisted of (1) receipt of the rolls of polypropylene and other raw materials used in half-bag production; (2) cutting operations on the bottom sheets and barrel; (3) printing of the name of the material supplier on the bag; (4) warehousing; and (5) consolidation and shipping to customers. Printing equipment at the Arlington plant was inadequate and unsatisfactory compared to the printing equipment at Memphis Street, the sole source of printing.

A heat cutting machine at Arlington (the ''Weist'' machine) cut polypropylene bags, whether half bags or bulk bags. The cutting of bottoms at the Memphis plant was also on a Weist machine.

Raw materials, principally woven polypropylene, for production of half bags at Arlington, were not shipped directly to Arlington; rather, all raw materials for such production was shipped to the Memphis plant and transhipped to Arlington. When there was such shipment, ordinarily there was no drop shipment of materials at Arlington because the half-bag

[2] General Counsel's August 4, 1989 motion to correct the official transcript, not opposed by Respondent, is granted.

[3] Respondent, in its answers and at the hearing, also conceded that Robert E. Langston, president; George Smith, general manager, Textile Division; Carl Hussey, plant manager (until on or about November 18, 1988); Bill White, production supervisor; Tony Little, supervisor; Terry Hall, supervisor trainee; Norman Neville, plant manager; and Ron Wargo, personnel manager, are all its supervisors and agents, respectively, within the meaning of Sec. 2(11) and (13) of the Act.

bottoms, in any case, were cut and printed at Memphis. This split production was unlike the prior production in the Crowley, Louisiana plant prior to 1986 when the entire half-bag production process was in one plant. Although Respondent considered single plant production of half bags at Arlington prior to the 1986 switch from Crowley, Respondent decided to have split production because Arlington, newly opened and having open production time, could not properly print the bags on existing Arlington equipment. It was decided that some cutting and the printing operation woould be performed in Memphis in 1986

In or about March 1983, Respondent decided to, and did, transfer the Arlington half-bag operation to the Memphis plant. The decision to transfer, in early March, 1988, was allegedly based on internal company memoranda following a Cotton Bale Packaging Convention in Memphis in early March. According to Respondent, this decision to transfer was based on a prediction that the cotton industry's need for half-bag production would be substantially diminished from the previous year and that Respondent could save transportation and other logistical costs in amalgamating the production operation at Texas Street. Six months later, in September 1988, however, there was an unexpected increase in demand for half-bags because of a larger than expected cotton crop. This demand for half bags could not be met from Memphis plant production and Respondent resumed production of half bags at Arlington which lasted about 6 weeks until November 1988, the end of the cotton packaging season. At this point, half-bag production was again discontiued at Arlington and continued only at the Memphis plant.

This interplant movement of half-bag production was not unique. Half-bag production from woven polypropylene occurred first in 1981 at the Texas Street plant in Memphis. In 1982, production was transferred from the Memphis plant to Respondent's plant in Jackson, Mississippi (open since 1963). In 1983, half bags were produced both at Crowley, Louisiana, and the Memphis plant. In 1984, half-bag production occurred only at the Crowley plant (open 1965) following a layoff of employees in half-bag production in Jackson, Mississippi. Half-bag production continued in Crowley, Louisiana from 1984 through 1986 when, in June 1986, it was transfered to the Memphis and Arlington plants.

Robert Langston, Respondent's president, credibly testified that, the consolidation of half-bag production in Memphis Street had been on his mind since 1986 when production was switched from Crowley, Louisiana to the split-site of Memphis/Arlington. He testified, however, that the actual decision to reconsolidate half-bag production only at the Memphis plant in Texas Street occurred in March 1988. There is no dispute that Arlington's sewing, assembly, baling, and cutting operations were transferred to Memphis pursuant to this March 1988 decision. However, Arlington's cutting machine remained in Arlington to cut its principal product, bulk bags. There was no move of major equipment following the consolidation of half-bag production in Memphis. While a few tables and minor items followed the consolidation, there was no new equipment purchased, no renovation of plant, and no capital outlay. Langston conceded that there was nver any written cost comparison of half-bag production between Arlington and Memphis. Apparently consistent with this failure to have any substantial cost comparison, Langston testified that he considered the move a matter of urgency and that time was of the essence. Langston admitted that he never saw the underlying figures of his supervisors who recommended the consolidation and depended only on their conclusions and recommendations based on transportation and other logistic considerations in making the transfer. The actual consolidation occurred in the first week of April 1988.

In particular, Langston testified that in the 1986 transfer of half-bag production from Louisiana to Memphis, all production functions were not placed in the Memphis plant because the Memphis plant did not have open sewing capacity at that time. That was the reason for the creation of a split operation: Memphis/Arlington.

He testified that there had been a consistent reduction in the demand for half bags as the packaging material for cotton: 57 percent of the cotton crop was wrapped in half bags in the early 1980s; but by 1988, it was projected down to about 15 percent. He noted that only four Memphis employees were producing half bags after consolidation at Texas Street in March-April 1988 whereas seven or eight employees had been making half bags at the Arlington Street location at the end of 1987. He admitted, however, that the hourly wage rate at Texas Sreet was higher but asserted that the overall efficiency of the operation at Memphis compensated for the higher wage rates paid the four employees. He particularly noted that there was no unnecessary handling, packing and unpacking and resulting damage to the product, stemming from transfer of goods between Arlington and Memphis. Additional savings resulted from the elimination of drop charges and trucking costs between Arlington and Memphis, a distance of miles.

Donald E. Wiseman, Respondent's operations manager covering all production plans, testified that the 1986 transfer of half-bag production to the split site did not mandate moving all half-bag production to Memphis because, inter alia, the new Arlington, Tennessee plant had no full book of production orders for bulk bags, its primary production function. In order to cover the overhead of open production capacity at Arlington, and since Texas Street did not have available sewing capacity, it was decided to put a portion of half-bag production operations at Arlington. Wiseman corroborated, however, that split-site production was unsatisfactory due to the excess handling and damage to the bale bags.

He testified that he was part of the 1988 decision to consolidate production. What actually precipitated consolidation, however, was that Texas Street now had open capacity due to the decrease in both its manufacture of ''textile bags'' and a further decrease in the anticipated demand for half bags. While trucking and handling were the major factors in addition to the open capacity at Texas Street, he denied that unionization of the plant at Arlington was discussed. A summary of company records comparing the trucking costs of goods in the years 1987 and 1988 (prior to and subsequent to consolidation at Texas Street) show that there were fewer trucking operations in 1988 after consolidation than in 1987 prior to the consolidation (R. Exh. 18).

B. *The Union's Organizational Drive at the Arlington Plant*

Shirley Teamer, first employed at the Arlington plant in August 1985, a few months after its opening, testified that when she began work at Arlington, Respondent already was making half bags and that in May 1986, she was transferred

into the half-bag department (following initial employment as an inspector) as a sewing helper. She remained a helper for about 6 months and then became a sewer of half-bag pieces (Tr. 697). She remained a sewer until the layoff occurred in the end of 1987, beginning of 1988, at which time, under plant rules, she bumped back and became an inspector. She recalled that the early 1988 layoff of half-bag employees was the only time in the entire period of her employment that there had been a layoff in the half-bag department (Tr. 699). To the extent that Langston testified that he had a recollection that there might have been seasonal layoffs of half-bag employees at the conclusion of the cotton season in 1986, his recollection is unsupported and not credited.

In any event, Teamer had already contacted the union representative (President Willie Rudd) in September 1987 for the purpose of unionization because of alleged unfair treatment by Respondent's supervisors at the Arlington plant. By the end of September 1987, she obtained union membership application cards from Rudd after she and employee Rosie Nabors had asked about 30 employees whether they wanted the Union. When they told her that they did, she obtained 50 union membership application cards from Rudd. She, Nabors, and other Arlington employees signed and distributed cards. The other employees who distributed cards were Dorothy Stewart, Justine Harwell, and Josephine Benson. In October 1987, she and other employees, particularly in the half-bag department, wore union buttons and union T-shirts. The shirts, however were not worn until the day before the November 25, 1987 union election. She wore the union T-shirt continuously after the election and was named a union shop steward.

Rosie Nabors, like Teamer, distributed union literature in the plant break room on breaktime and also outside the plant. She did this on many occasions in the period October through November 1987, when the election occurred. She also wore union insignia (the button and red T-shirt) perhaps 10 times in a 6-week period.

As a result of this union activity, including the signing of cards by employees at the Arlington plant, the parties stipulated at the hearing that, in Case 26–RC–6994 (*Langston Cos.*), the Union filed a petition for certification on October 9, 1987; the petition was served on October 14, 1987; the parties then executed a Stipulated Election Agreement approved by the Regional Director for Region 26, on November 2, 1987; a Board-conducted election took place on November 25, 1987; the unit was a production and maintenance unit at the Arlington, Tennessee plant, inter alia, excluding truckdrivers; the tally of ballots showed that, of 64 eligible voters, 37 voted for the Union and 25 against (with 3 challenges, insufficient to affect the results of the election); and that the Union was certified as the statutory collective-bargaining agent on December 3, 1987.

C. *Robert Langston's Attitude Concerning Union Activities at the Arlington Plant*

1. Langston's testimony on his preelection speeches

Respondent, at its Memphis plant, recognized and had a collective-bargaining relationship with the International Brotherhood of Teamsters in the 4-year period 1967–1971.

Langston testified that in October-November 1987, preelection speeches, he told his employees that if the Union won the election two things could happen: either there would be an agreement on a contract or there would not be an agreement on a contract. In the latter eventuality, three things could happen: the Union could call a strike; the Union could agree that its promises were ''impractical'' and agree to the Company's position, in which case there would be a contract, or lastly, the Union could ''walk away.'' In particular, Langston denied telling employees that he would fire them or fire strikers or that he had fired strikers at the Texas Street plant when there was a strike called by the Teamsters when the Teamsters had represented a unit of employees there; and he denied ever saying that he would close the Arlington plant in the event of the Union winning the election. He admitted making two speeches from prepared texts prior to the election (Tr. 1564).

On cross-examination, Langston admitted that he could have told employees that they could lose their jobs if they went out on strike (Tr. 1578). In response to the question whether he told them that the employees who went out on strike in support of the Teamsters had been replaced or fired, he testified that he did not recall having told the Arlington employees that Texas Street employees had been replaced or fired. In response to the further question of whether he *could have* told him that, he answered that he *could have* told them that but then changed his testimony and said that he could not have told them that the Texas Street employees had been fired because ''that never happened and I don't think it could happen and I think it is legally impossible to happen'' (Tr. 1578).

2. Shirley Teamer

Teamer testified, and I find, that prior to the election, Langston not only made speeches to employees on at least several occasions, but actually came to and worked in production with them at the Arlington plant (Tr. 723). In these speeches, he said that he didn't want a union in, wasn't going to have a union, and particularly not the union that the employees were supporting. He told them at in the 1970s, the Company had a union at the Memphis plant where the employees went out on strike, and he replaced them all through advertisements in the newspaper. She also recalled that he said that the (charging party) union was the cause of the Aeolian Piano Company closing its furniture factory.

With regard to negotiating a contract with the Union, Langston told the employees that they weren't going to get a contract; that he wanted no contract; that he didn't need a union and that the employees ''could go from 8 to 10 years without a contract.'' She testified that when Langston made these remarks, he spoke to 45 to 50 employees in three groups (Tr. 735). The speeches were in the lunchroom with Langston standing and reading from some papers. Respondent did not produce the written speeches.

3. Josephine Harwell

Harwell corroborated that prior to the election, Langston spoke for 30–35 minutes to several groups of 15 employees (Tr. 786) in the lunchroom. The employees were paid for the time they spent at the speeches. With regard to what happened to Respondent's employees who had been unionized at Texas Street, Langston told the Arlington employees that the Memphis employees had gone on strike and they all got

fired. She then changed her testimony and said that he did not use the word fired but used the word ''replaced.'' She thereafter insisted that he said that the employees had been fired and were replaced (Tr. 787–788). Like Teamer, Harwell recalled that Langston actually came out on the production floor and worked along with the Arlington employees. On one Friday, in mid-October 1987, prior to the election, Langston asked Harwell ''how did [you] get back here [in the half-bag department] with these troublemakers?'' To this question, Harwell said she merely smiled (Tr. 789). Harwell was wearing a union button at the time but it was on her pants leg and he did not see it. She testified that he first learned of her support of the Union election day, November 25, when she wore the union T-shirt. Prior to that time, she wore the union button on her pants leg but always successfully hid it in the presence of Langston or any other supervisor.

Corroborating Teamer, she testified, and I find, that concerning negotiating a contract, he told the employees that it took some companies 8 to 10 years to get a contract; that he didn't want a union and particularly didn't want the union that the employees were supporting. He gave no reason for this statement (Tr. 786).

4. Josephine Benson

Benson testified that before the election, she was in a group of 10 employees in the lunchroom (breakroom) in the morning when Langston gave the speech. She recalled that Langston said that the employees voted the union in, the union would do nothing but take the employees out on strike and then Respondent would fire them and hire new employees (Tr. 973). I do not credit her testimony that Langton used the word ''fired.'' He further told the employees that the Respondent 's employees in Memphis had gotten the union in and thats what happened at that plant. Respondent ''fired them'' when the union ''pulled them out of [sic] strike.'' She further testified that Langston said ''go ahead and vote the union in; it didn't mean that was going to give us a contract; it would take from 8 to 10 years; we could be negotiating from 8 to 10 years.'' In addition, he said that the law required him to negotiate in good faith but that did not mean that he had to give the employees anything; that Respondent and the Union could negotiate from 8 to l0 years but that didn't mean that he would have to give the employees a contract (Tr. 916).

On the basis of the above testimony, I credit General Counsel's witness' testimony except that Langston, in his speeches prior to the election, (a) told the employees either that the Texas Street employees (supporting the Teamsters 15 years or more prior thereto) had be ''fired'' or that he would ''fire'' the employees at the Arlington, Tennessee plant; and (b) told the employees that he would close the plant. Thus I conclude that he told the employees that he didn't want a union; that he didn't want the union they were supporting; and that in the event the employees voted for the Union, he would not give it a contract but would rather negotiate from 8 to 10 years before giving them anything. I further conclude that these Langston speeches manifested a substantial union animus from Respondent's president and chief operating officer, an owner of a substantial (if not controlling) interest in Respondent. I further conclude, on the basis of his admission (Tr. 1578), that he ''could have'' told the employees, that he *did* tell them, that if they went on strike they '' could lose their jobs.'' Lastly, I conclude that he told the employees that, in the absence of a contract through bargaining, the alternatives were that the Union could call a strike; the Union could agree that its promises were not ''practical'' and agree to the Company's position, in which case there would be a contract or that the Union would simply walk away, which had been his experience at the Texas Street location in 1971 (Tr. 1450–1451).

None of Langston's statements were alleged to be or constitute unfair labor practices. Nevertheless, as above noted, I find that they constitute evidence of substantial animus against the Union which may well have affected his attitudes after the election in dealing with the Union and with employees who were supporters of the Union

D. *The Allegations in the Third Consolidated Complaint*

1. Overtime work to Teamer and Nabors, October 1987

Paragraph 7 of the third consolidated complaint alleges that on or about October 10, 1987, Respondent refused to permit its employees, Shirley Teamer and Rosie Nabors, to work overtime, which conduct it is alleged, resulted from their engaging in union and concerted activities, the result of which constitutes a violation of Section 8(a)(1) and (3) of the Act.

The facts regarding the failure to offer Teamer and Nabors overtime on Saturday, October 10, 1987, are largely undisputed. As above noted, Teamer and Nabors were initiators of the union organizational campaign in late September and early October 1987, in contacting the Union and obtaining and distributing authorization cards among coemployees. Nabors and Teamer also distributed literature in the break room, and outside the plant up until the election. Respondent undoubtedly had knowledge of these early, overt union activities. Nabors wore her union pin almost every day. On the other hand, Justine Harwell, Josephine Benson, and Dorothy Stewart also distributed union cards in the break room prior to the election. It is undenied that in addition to Nabors and Teamer, Justine Harwell, Josephine Benson, Dorothy Stewart, Cynthia Tapplin, Cyrus Payne, and Helen McBride all openly wore union insignia prior to this October 10 overtime issue (Tr. 683–684). Although Teamer and Nabors were named the only shop stewards among the half-bag employees, Respondent was not notified of their being named to these positions until January 20, 1988. On the other hand, contrary to any denial by Robert Langston, I conclude, on the basis of credited testimony of Josephine Harwell, that Langston's October question to Harwell as to why she was in with the ''troublemakers,'' referred to the prounion half-bag employees, *United States Steel Corp.*, 279 NLRB 16 (1986).

On October 7 or 8, 1987, Bill White, Arlington plant manager, had to schedule overtime for Saturday, October 10, because of receipt of an order to sew labels on bulk bags. Thus on Wednesday or Thursday October 7 or 8, White told all the employees in both the bulk-bag department and the half-bag department, except Nabors and Teamer, that they would have to work on Saturday, October 10. On Friday, October 9, White asked four half-bag employees to work overtime on the following day, to sew labels on the bulk bags. Teamer and Nabors were the only employees among all production

employees (bulk-bag and half-bag employees) who were not asked to work. When Nabors learned that White had asked the other half-bag employees to work overtime, she asked him, on October 9, if he wanted her and Teamer to work on Saturday. White told her that he did not.

The work performed on October 10 consisted of sewing and inspection work. Teamer was capable of performing both the sewing and inspection work and Nabors was capable of performing the inspection work.

General Counsel alleges that the elements of a prima facie case were proved: that Teamer and Nabors were denied the overtime work on October 10 because of their *leadership* in the organizing campaign and that Respondent had failed to meet its subsequent burden to prove that they were denied the overtime for legitimate reasons. Thus General Counsel argues, and there is no dispute, that there was work available on October 10 which Teamer and Nabors were both capable of performing; that Teamer and Nabors were the only 2 of 60 employees who were not offered work; that other employees who had not displayed support of the Union declined offers to work; and that Teamer and Nabors held greater seniority than employees who were offered overtime work. Thus, General Counsel argues, there exists Respondent's union animus, its knowledge that Teamer and Nabors supported the Union, the timing of the action shortly after the initiation of, and during, card distribution among the unit employees and, as above noted, the lack of a legitimate business reason for the failure to offer them the overtime work .

a. *Respondent's defense*

White testified that he did not need six half-bag employees to sew labels, only four. He needed two sewers and two helpers. He said that he chose the two sewer/helper teams who sewed half-bag barrels (as opposed to Teamer and Nabors who only sewed half-bag hems); and that he picked the Benson and Harwell sewing teams because their work stations were located more conveniently to the areas where the bags were beeing worked on and where the baling would occur. White denied knowledge of the union activities of Teamer or Nabors and denied knowing that Teamer and Nabors wore union buttons as of his decision not to use them on overtime. White's undenied testimony is that on October 10, the bulk-bag employees worked a full 8 hours but the half-bag employees finished earlier and were released after 7-3/4 hours, because the inspectors ran out of bags to inspect and he had the half-bag employees sweeping the floor.

b. *Discussion and conclusions*

The undisputed fact is that of the entire complement of more than 60 employees employed in both bulk-bag and half-bag production at the Arlington plant, the only 2 employees who were not offered overtime were Nabors and Teamer. This disparate fact, coupled with their being original union instigators and organizers, makes for an easy and reasonable inference that, in the presence of Respondent's clear and outstanding union animus, the failure to select them for overtime was unlawfllllly motivated. Respondent's denial of any knowledge of the union activities of Teamer and Nabors is not acceptable because their open and notorious wearing of buttons and other union paraphernalia before October 10 and before White's October 9 denial of overtime. It is therefore disingenuous and extremely suspicious where White denied such knowledge and Respondent, itself, characterizes White's denial as possibly being ''wrong'' (R. Br. p. 6).

The drawing of the necessary inference of unlawful motive, however, is undermined, as Respondent argues, by the fact that all the members of the half-bag department openly wore the same type of union insignia that Nabors and Teamer wore prior to October 10, 1987, and *they* were all asked to work overtime on October 10. In addition, Nabors some that misleadingly testified what Respondent was notified that only two of the half-bag employees—she and Teamer—were made union stewards. The evidence showed that Respondent was not notified of their being selected union stewards until 3 months after the alleged discriminatory action herein, i.e., on January 20, 1988. Furthermore, it is undisputed that Nabors received a promotion from ''helper'' to ''sewer'' in September 1988, *after* Respondent allegedly discriminated against her in October 1987, and *after* she had been appointed shop steward along with Teamer.

The underlying problem in the present case is not the existence of a theoretical prima facie case; that exists. Rather, as Respondent argues, there is no proof of any disparate treatment among the prounion employees who constituted the half-bag department. While disparate treatment is not a condition precedent to an inference of unlawful discrimination, in the absence of evidence of direct discriminatory motive, it is sometimes an element in the formation of an inference of unlawful motivation.

Here, they all wore union insignia, as did Nabors and Teamer, and I will assume on the basis of the evidence before me that Respondent knew that all such employees favored the Union. With regard to Nabors and Teamer, there is no evidence of direct discriminatory motive. The problem with drawing such an inference from the entire record is that there is no proof that Respondent knew that, among all the prounion half-bag employees, it was Nabors and Teamer who were the union instigators or otherwise distinguished themselves in such fashion as to engage Respondent's substantial union animus. In short, in the absence of evidence of some distinguishing factors on which I might find that Respondent's union animus directly fastened; I cannot conclude that Respondent singled out Nabors and Teamer for unlawful treatment in failing to offer them overtime work on October 10, 1987, when it offered work to all other prounion employees. Thus, I conclude, that while a weak prima facie case exists, and examination of all the facts and circumstances demonstrates the General Counsel failed to prove that Respondent (a) singled out these two employees *because of their union activities*, (b) when their union activities were the same or, on this record, indistinguishable from the union activities, (c) *known to Respondent* of the other openly prounion employees in the half-bag department. In view of these conditions, I conclude on the basis of the entire record that the prima facie case has been rebutted and that General Counsel has failed to support its statutory burden to prove that Respondent failed to offer overtime to Nabors and Teamer on October 10 because of unlawful reasons. I therefore recommend to the Board that this allegation be dismissed as insufficiently supported in the facts. In this regard, I have applied the rule in *NKC of America*, 291 NLRB 683

(1988), in which the Board applied its *Wright Line* analysis.[4] There the Board held, that the employer may defend either by demonstrating that it would have taken the same action regardless of any protected activity engaged in by the discriminatees, *NLRB v. Transportation Management Corp.*, 462 U. S. 393, 400–401 (1983); or, it may rebut the General Counsel's prima facie case (in which there is no direct evidence of discriminatory motive) by showing a lack of disparate treatment. General Counsel has of offered insufficient other proof distinguishing the activities of Teamer and Nabors so that I might infer, nevertheless, a discriminatory motive. See footnote 1, *NKC of America*, supra. I therefore recommend that the allegation be dismissed.[5]

2. The alleged unlawful transfer of unit work from Arlington to Memphis

There is no dispute that, following the November 25, 1987 election, on December 3, 1987, the Union was certified as the statutory collective-bargaining representative of the Arlington production and maintenance unit, an appropriate unit; and that since November 1987, the Union has been the Section 9(a) representative. Indeed, in a letter to the Union of December 7, 1987 (G.C. Exh. 2(B), having already received the December 3 Certification of Representative from the Regional Director, Respondent notified the Union that it ''recognized the Union as the bargaining agent, and stands ready commence negotiations at a mutually convenient date and place.'' The same letter notes that Respondent was expecting a request for data from the Union concerning the bargaining unit so that the Union might ''better prepare for negotiations.''

On December 10, 1987, the Union submitted a request for 27 elements of information that it required for bargaining and suggested January 7 and 12, 1988, as bargaining dates (G.C. Exh. 2(A)). A week later, on December 18, 1987, Respondent notified the Union (G.C. Exh. 2(D)) that, with the end of the cotton season, Respondent would cease making half bags at the Arlington plant between December 3 and January 8, and would lay off eight employees. In the same communication, Respondent notified the Union that, consistent with past practice at the Arlington facility and consistent with the layoff and recall policy in Respondent's employee handbook, the eight half-bag employees would be permitted to exercise plantwide seniority in order to ''bump'' into jobs for which they were qualified.

While Respondent suggested, in a letter to the Union dated December 22, 1987, that contract negotiations begin on January 1 (G.C. Exh. 2(C), on December 31, 1987, the parties met to discuss the shutdown of the half-bag department and the layoff of employees (Tr. 30). In the meeting, Respondent told the Union that it anticipated that production of half bags would resume at Arlington in March or April 1988 (Tr. 30–31). On or about January 15, 1988, half-bag production ceased; Respondent conducted a layoff in accordance with the Respondent's letter of December 18 (Tr. 45–46); and employees in the half-bag department, exercising plantwide seniority, bumped into other jobs in bulk-bag production. This caused the layoff of employees in the bulk-bag department. General Counsel alleges, paragraph 14 of the third consolidated complaint, that the layoff of these bulk-bag employees violated Section 8(A)(1), (3), and (5) of the Act when, in March-April 1988, Respondent transferred unit work from Respondent's Arlington, Tennessee facility to the Texas Street facility. The cessation in Arlington of half-bag production in January was also alleged as a violation.

At least four employees (Harwell, Teamer, Stewart, and Benson) who elected to bump into other positions suffered an ''initial'' reduction in earnings (G.C. Br. p. 7). While the union requested an explanation of how this had occurred in view of the historical calculation of incentive pay (based essentially on the prior month's production rate of each employee (G.C. Exh. 2(L)), Respondent effectively explained the drop in wages (G.C. Exh. 2(M)). In fact, each bumping employee was informed that the rate of pay would be that of the job into which each had bumped; and each of the four employees, after being so informed, agreed to exercise her right to bump into the new job (G.C. Exh. 2(M)).

On March 24, 1988, Respondent notified the Union (G.C. Exh. 2(N)) that the Company had decided to produce half-bags for the 1988 cotton season at the Texas Street facility (Memphis) notwithstanding that the work had been done for two prior seasons at Arlington. Respondent observed that, prior to those two seasons, half bags had been made at the Crowley, Louisiana plant, and before that at the Texas Street plant in Memphis. The notification also included the advice that half-bag machinery would be transferred as soon as possible. (In fact, there was no substantial transfer of any machinery between the two locations). Respondent, in the same communication, notified the Union that the relocation of production would result in cost savings because manufacture would occur where the product would be consolidated and shipped. Generally stating that there were other cost and efficiency considerations weighing in favor of consolidating half-bag production at Texas Street, Respondent specifically stated that labor cost was not a factor. Finally, it stated that savings from factors other than labor costs were factors over which the Union had no control.

In this regard, Respondent notes that the historical production of half bags demonstrates that it was a ''vagabond'' product (R. Br. p. 16): half-bag production originated at the Texas Street (Memphis) plant in 1981; moved in its entirety to the Jackson, Mississippi plant in 1982; in 1983, was produced in entirety both at the Jackson, Mississippi and Crowley, Louisiana plants; in 1984 all half-bag production was concentrated and consolidated at the Crowley, Louisiana plant through 1985–1986 with half-bag production ceasing in its entirety at the Jackson, Mississippi plant, resulting in the layoff of employees at Jackson, Mississippi. In the period June-August, 1986, half-bag production was transferred from Crowley, Louisiana to the two Tennessee plants. There was a layoff at the Crowley, Louisiana plant when half-bag production was discontinued.

[4] *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (lst Cir. 1981), cert. denied 455 U.S. 989 (1982).

[5] The third consolidated complaint, par. 8, recites that the above allegations regarding the overtime work of Shirley Teamer and Rosie Nabors were disposed of in a settlement agreement between Respondent and the Regional Director, Region 26, on March 9, 1988. The complaint also recites (par. 28) that the Regional Director, having issued the complaint alleging the commission of further unfair labor practices, vacated and set aside the aforesaid settlement agreement (Case 26–CA–12392). General Counsel failed to suggest that I draw any adverse inference from Respondent's having executed this settlement agreement with the Regional Director and, of course, I draw none.

a. *Half-bag production resumes at the Texas Street location in Memphis*

On March 24, 1988, Respondent notified its employees in the nonunionized plant at Texas Street that half bags would be produced there during that year and it planned on having two sewers and folder-counters on such production. It invited Texas Street employees who were interested in these positions to sign up. Six employees signed for sewer positions and nine for folder-counter positions. Respondent selected two Texas Street employees as sewers (Thompson and Heard) and two employees as folder-counters (Tart and Bryant) (G.C. Exh. 18; G.C. Br. p. 8)). These four employees began work on half bags in the payroll week ending April 9, 1988. Thompson testified that the production standard established for her and Heard was 750 bags per 8 hours, a standard different from that of the half-bag sewers at, Arlington. Thompson, who had no experience sewing half bags, was unable to meet this standard and was retransferred to her old sewing position. Heard also failed to make her half-bag production standard and was reassigned to her old job. They had worked on half bags for about 8 weeks.

Production of half bags at Texas Street required the same similar production functions as that at Arlington. Production at Texas Street involved no new purchase of equipment or outlay of capital expenditures and there was no change or modification in the finished product. The rates of pay of both Heard and Thompson, working on half-bags, exceeded the rates of pay of the half-bag sewers at Arlington.

Half-bag production resumed at Arlington, as above noted, in late September 1988, and continued through November 1988, due to a sudden and unexpected demand for half bags because of an especially large cotton crop.

In a letter of April 11, 1989, the Union requested Respondent to furnish the data related to the transfer of the half-bag work to Texas Street (G.C. Exh. 2(O)). Respondent answered the letter on May 23, 1989 (G.C. Exh. 2(P)), specifically refusing to furnish information concerning 11 of the 18 items requested because it asserted, the Union's request related to the ''decision'' regarding the transfer rather than to the ''effects'' of the decision.

Respondent denies, in its answer, that the information requested by the Union was necessary for and relevant to the Union's performance of its function as exclusive bargaining representative and denies that it failed and refused to furnish the Union with the information requested. Rather, Respondent alleges (answer, par. 18) that it furnished the Union with requested information as to the reasons the half-bag product was relocated, from Arlington to Memphis, and how the relocation would save Respondent money. General Counsel asserts that Respondent's answer to the third consolidated complaint constitutes an admission that it transferred the unit work without affording the union an opportunity to bargain over the decision. Reading Respondent's answer in conjunction with its communication to the Union of May 23, 1988 (G.C. Exh. 2(P)), wherein it noted that on March 24, it offered to negotiate with the Union concerning the *effects* of the decision to relocate, I conclude that, as a matter of fact, Respondent, as alleged in paragraph 15 of the third consolidated complaint, transferred the unit work without affording the Union an opportunity to negotiate and bargain with respect to the *decision* concerning the transfer.

Similarly, with regard to the allegation that the Respondent refused to provide the Union with information concerning the decision to transfer the work, Respondent admits (R. Br. p. 21) that it did not respond to the request for information relating to the ''decision'' to relocate.

b. *The annual meeting of the National Cotton Counsel, March 2, 1988*

On March 2, 1988, the National Cotton Counsel held its annual meeting in Memphis. President Langston, Vice President George Smith and Operations Director Don Wiseman attended the meeting.

As above noted, in early 1986, half-bag production was terminated at Crowley, Louisiana and moved to a ''split' production site: to the Memphis and Arlington plants.

Langston testified that he considered the split-site production of half-bags unsatisfactory; in l986, he did not place all production in the Memphis plant because the Memphis plant did not have available sewing capacity at that time, and that was the reason that they went into the split operations in 1986. Operations Directer Donald Wiseman testified (Tr. 1719–1721) that, in addition to not having enough half-bag production capacity in Texas Street in 1986, Respondent's Arlington facility was a new plant and did not have a full book of orders in the production of bulk bags. To meet overhead, additional production was required. He therefore put a portion of the half-bag production at the Arlington plant. Like Langston, Wiseman testified that the split-site production was unsatisfactory because, among other reasons, there was an excess of ''handling'' of the baled bags with resulting damage the bags and complaints from customers. He testified that what caused the consolidation in March-April 1988 at the Texas Street plant of half-bag production was that the Texas Street plant now had open production capacity due to a decrease in the demand for ''flat weave'' (textile) bags and there had been a decrease in the demand for half-bags. In addition, there would be an elimination of the trucking of the completed, baled, half bags between Arlington and Texas Street where the baled half bags would be consolidated and warehoused.

Apparently what allegedly precipitated consolidation of all half-bag production at the Texas Street plant, however, was the occurrence of the March 2, 1988 meeting of the National Cotton Council. The staff report of March 2, 1988, apparently read and distributed at the meeting at which Langston, Wiseman, and Smith were present, showed that the 1981 cotton crop was 90 percent packaged with polypropylene materials of which 51 percent were half bags and 34 percent spiral-sewn bags (''cottontainers''). Jute and burlap were used on only 8 percent of the crop. In 1982, 91 percent of the cotton crop was packaged in polypropylene materials with 50 percent in half bags and 37 percent in spiral-sewn bags. In 1983, polypropylene packaged 94 percent of the cotton crop with 51 percent in half bags and 40 percent in spiral bags. In 1984, polypropylene packaged 96 percent of the crop with 49 percent in half bags and 44 percent in spiral bags. In 1985, 97 percent of the crop was packaged in polypropylene with 38 percent in half bags and 57 percent in spiral-sewn bags. Jute and burlap declined to 1 percent of the total bagging. In 1985, woven polypropylene as a packaging product slipped to 86 percent of the crop, down from 97 percent the previous year (R. Exh. 14, p. 3). The slippage was due to

an increase in the use of burlap bags and polyethylene bags. In addition, 60 percent of the crop was wrapped in spiral-sewn bags and it was noted that there was a ''large reduction'' in the use of ''bags and sheets'' (half bags) (R. Exh. 14, p. 4). In the packaging of the 1987 crop, polypropylene slipped to an 80-percent share (down from 86 percent in 1986 and 97 percent in 1985). Of this 80-percent share 56 percent was packaged in spiral-sewn bags and only 23 percent in half bags. Jute and burlap packaging were used on 15 percent of the crop with polyethylene remaining a constant 4 percent.

Langston characterized the above statistics as showing a ''dramatic reduction'' in the demand for half bags (from the early 1980s until the present time) and stated that the demand for half bags, in terms of its percentage of the total of woven polypropylene wrappers, was expected to drop to an annual demand of about 15 percent of woven polypropylene packaging materials.

Langston urged his subordinates to analyze and determine whether half-bag production could be consolidated in one location (Tr. 1540) and, on the very next day, March 3, 1988, Vice President George Smith submitted a memorandum to Langston (R. Exh. 15) entitled ''1988 half-bag production.'' The memorandum starts with the statement, ''Bob, I recommend that we manufacture half-bags from the 1988 season at our Texas Street facility. ''His recommendations are based on three considerations: (1) logistics; (2) production; and (3) market.

With regard to ''logistics,'' the Smith memorandum asserts that since the woven polypropylene is supplied in mixed shipments of half-bag and ''cottontainer'' (spiral bag) fabric, the Texas Street receivers of these shipments must otherwise rehandle and transport the half-bag portion back to Arlington. Further, since the bottoms of the half bags are printed at Texas Street ''for housekeeping and cost reasons,'' this requires the baling and transport of the bottoms of Arlington. Lastly, half bags baled and a asembled at Arlington must be transported to Texas Street for distribution and storage. Thus he concludes that, from a logistics point of view, the manufacture of half bags should be at Texas Street.

With regard to ''production,'' the Smith memorandum asserts that half bags at Arlington are cut on its Weist machine but that machine's capacity is fully utilized in bulk-bag production. To continue half-bag production in light of such full utilization would require expensive manual cutting on half bags. Secondly, the prior cutting capacity at Texas Street had been fully utilized on spiral bags and half-bag bottoms. With the increase in burlap market share and the reduction in woven polypropylene share of the cotton container market, Smith asserts that ''some cutting capacity'' has been freed up providing the opportunity to process half bags at Texas Street. He notes at this had not been available in past years.

Lastly, with regard to ''market'' considerations, Smith asserts that the statistics revealed at the prior day's (March 2, 1988) meeting of the National Cotton Council, showed a progressively smaller half-bag share of the annual bale wrap market. Since burlap was replacing significant quantities of polypropylene containers, Smith asserts that for the first time Respondent might have the capacity to process all their cotton packing products (half bags and spiral bags) in one location. Finally, Smith asserts that he would make provisions for the manufacture of half bags at Texas Street by early April 1988.

Five days later, on March 8, 1988, Operations Manager Don Wiseman submitted his memorandum regarding half-bag production. Having finalized the 1988 projection for polypropylene half-bag requirements, and considering all factors, he recommended that full scale manufacturing of half bags begin no later than March 15 at Texas Street. He cites three basic factors in support of this recommendation: (1) negotiations to purchase complete half bags for resale were on terms which proved to be uncompetitive; (2) The 1987 manufacture of half bags at Arlington created major logistical problems. He notes that all other bagging and metal tie manufacturing had been manufactured or shipped from the Texas Street plant and that combining all items for truck shipments was hindered by having two separate locations, especially waiting for half-bag products to transferred from Arlington to Texas Street in order to have a complete truck load. Furthermore, from a raw material standpoint, it would be more ''effective'' to bring all cotton bale materials to one plant rather than having to distribute to two different facilities; (3) There would be a reduction in both inbound and outbound freight expenses and delivery and shipping from one facility. In particular, there would be an elimination of any common carrier ''drop charge'' for stopping at two plants and a similar ''pick up'' charge for loading at two plants. In sum, he recommended both on the basis of logistics and cost effectiveness that the entire product line be placed under one roof and that there would be an overall benefit in manufacturing the half bags at Texas Street.

Langston testified that what spurred him to a conclusion the there should be a consolidation of half-bag production were three events: (1) the annual meeting of the National Cotton Council; (2) the decline of requirements of textile bags produced at Texas Street, which had occurred for the first time since 1981 and therefore opened up both room and production capacity at Texas Street; and (3) even polypropylene spiral-bag demand had decreased in the face of an increase usage of burlap bags. He testified that time was the essence to commence production in April because of the advent of the cotton growing season between April and October-November of each year.

In support of Respondent's December 31 statements to the Union that half-bag production would restart at *Arlington* in March, Langston testified that the January halt of production at Arlington had only been seasonal and that there was no intent to close down half-bag production at Arlington at that time. What created a different conclusion, and a decision not to restart half-bag production at Arlington, was the advent of the above three factors which show that consolidated production should occur, and should be instituted at Texas Street. He further testified that in making a decision to consolidate half-bag production, he relied on verbal statements made at the National Cotton Council meeting on March 2 (Tr. 1523) as well as the memoranda he received from his subordinates.

Lastly, it should be noted that the printing on the half bags, a requirement of the National Cotton Council (requiring the name of the fabric manufacturer and the name of the bag maker to appear on the bag) is done on a printing machine located at the Texas Street location where it is attached to its Weist cutting machine. There is no similar printer at the Arlington location.

c. *The testimony of Justine Harwell*

Harwell testified that in the period of her employment in the half-bag department at Arlington, April 1986 through November 1987, there had not been a layoff of half-bag employees. In November 1987, however, about 2 days before the election (Tr. 770), Harwell had a conversation with Langston who was at the Arlington plant. She testified that there was a rumor in the plant that Respondent was going to halt its half-bag operations at Arlington. Harwell called Langston over and asked him if he had heard the rumor in the plant and told him she wanted to know the truth. She asked him whether it was true that half-bag production was getting ready to close. Langston said it was not true. Langston said, ''half bags is a year-round job'' (Tr. 769). As above noted, it was Langston who, prior to the election, and indeed in mid-October of 1987, asked Harwell, while he was handing out paychecks on a Friday: ''How did you get back here with these troublemakers?'' (Tr. 788). On the other hand, Harwell testified that working conditions in bulk bags were more desirable than in half bags. Indeed, in 1986, when she was first transferred from bulk-bag to half-bag production, she objected because the half-bag production area was smokey and cold in winter (Tr 799). Finally, she *testified* that although her incentive rate as a half-bag sewer was $5.15 per hour, and while her rate was reduced in the bulk-bag bumping of January 19 to $3.95 an hour, her incentive rate rose only to $4.44 an hour in bulk bags (Tr. 804). Lastly, the above November 1987 rumor about which she spoke to Langston must be measured against Respondent's December 31 assurance to the Union that half-bag production would resume in Arlington in March. There is no suggestion that such a statement was false.

d. *The testimony of Ron Wargo*

At the hearing, in view of Harwell's testimony, above, Respondent introduced its payroll records relating to the employees who were formerly employed as half-bag sewers and helpers who had bumped into bulk-bag production subsequent to the January, 1988 close-down of half-bag production at Arlington (R. Exh. 41). It is these figures which substantiate General Counsel's assertion that employees who, having exercised plantwide seniority bumped into positions in the bulk-bag department, *initially* received a reduction in earnings, particularly Harwell, Teamer, Stewart, and Benson (G.C. Br. p. 7). It is uncontradicted, however, based on Respondent's records (R. Exh. 41), that the seven bumping employees fared better in terms of their rates of pay after bumping into the bulk-bag department than in producing or working on half bags.

Josephine Benson: Benson enjoyed a wage rate of $4.96 per hour in the 6-month period June through December 1987. Upon bumping into bulk bags, her rate fell to $4.92 per hour (as General Counsel asserts, this was an ''initial'' reduction in earnings) but in the period April through December 1988, in bulk Bags, Benson's rate rose to $5.88 per hour. When the additional factor of the resumption of the half-bag production (in the period September through November 1988) is taken into account, Benson's average wage rate in the April 1988 through December 31, 1988 period rises to $6 per hour.

Justine Harwell: In the period June 1987 through January 1988, she earned an average of $5.04 per hour. After bumping into bulk bags in January 1988, the record shows that in the 3-month period January 1988 through April 1988, her hourly average rate of pay declined to $64.25 per hour. In the succeeding period April 1988 through December 1988, her hourly wage rate rose to $5.04 an hour; and when her work on half bags was taken into account, her wage rate increased to $5 per hour.

Shirley Teamer: In the period June 1987 through January 1988, she had average hourly earnings of $4.26 per hour. Upon bumping into bulk bags, her average hourly rate declined to $4.13 per hour, but in her period April 16, 1988 through December 31, 1988, her average hour rate rose to $4.74 per hour. When half-bag work is included in the period September to November 1988, her average hourly rate rose to $4 per hour.

Dorothy Stewart: In the period June 1987 through January 1988, she had average hourly earnings of $4.16 per hour. Upon bumping into bulk bags in January of 1988, her average rate rose to $4.59 per hour and commencing April 1988 through December 1988, her average hourly rate rose to $5.17 per hour. When her work on half bags in September through November 1988, is included, her average hourly rate rose to $5 per hour.

Rosie Nabors: In comparable periods she had her $3.87-per-hour wage rate in half bags rise, upon bumping into bulk bags, to $3.90 per hour and thereafter to $4 an hour.

Helen McBride: In comparable periods, she had her $3.85-per-hour half-bag rate rise up to $3.90 in bumping into bulk bags, which rate thereafter continued through December 31, 1988.

Lastly, the hourly paid salaries (as opposed to incentive rates) paying $3.45 per hour as a half-bag baler rose, upon bumping, to $3.67 an hour and thereafter to $3.83 per hour in the period April through December 1988.

e. *Discussion and conclusions*

General Counsel advances seven basic arguments in favor of his conclusion (G.C. Br. p. 32) that the transfer of half-bag work from Arlington to Texas Street, in violation of Section 8(a)(3) and (5) of the Act, was motivated by a desire to discourage Respondent's employees from continuing to support the Union and to undermine the Union's bargaining position. Thus, in moving the half-bag functions from Arlington, a unionized facility, to Texas Street, a nonunion facility, General Counsel states that the following seven reasons demonstrate Respondent's discriminatory and unlawful motive.

(1) Respondent removed the work from employees who were most experienced in producing half-bags and assigned it to employees who possessed no experience in such work.

The short answer to this proposition is that it is entirely true.

(2) Respondent lost the productivity edge at Texas Street by admittedly shifting the work from employee-to-employee.

The record shows that the two sewers who were assigned the half-bag sewing function from among Respondent's requested volunteers performed the half-bag sewing function for about 8 weeks, and could not reach the production standard set by Respondent. The answer to his proposition is that it is essentially true though part of the first reason advanced by General Counsel.

(3) Respondent admittedly failed to cut costs by having the work performed by fewer employees at Texas Street.

General Counsel accurately described Langston's testimony (Tr. 513) in which he admitted that it was not cheaper, in terms of labor costs, to make the half-bags at the Memphis Street location. General Counsel, however, failed to cite Langston's testimony that the ''one-step'' production operation at Texas Street was ''more efficient at Texas Street just because there was less moving around and less steps in the process, just less costly overall'' (Tr. 514). In support of Langston's testimony (he was unfamiliar with the underlying record in support of his conclusion that production was less costly at Texas Street notwithstanding that labor cost might not have been less costly), Respondent produced, at the hearing, its interplant and extraplant bills of lading to demonstrate the comparative number of trucking operations generated with and without split-site production (R. Exh. 18). Thus, the underlying records were available to General Counsel to inspect whether the computation, executed for purpose of the hearing, was accurate (R. Exh. 18).

The computation compares trucking activity in fiscal years 1987 and 1988 by breaking down trucking operations both on a tractor-trailer basis and a pickup truck basis concerning half-bag shipments; shipments other than half-bag shipments; and shipments involving half bags when in combination with other shipments. In fiscal year 1987 (December 1, 1986–November 30, 1987), tractor-trailer activity involving half bags alone developed 53 bills of lading. This, course, is the period of ''split-site'' production with part production at Texas Street and part in Arlington. In addition, in the same period, there were 16 bills of lading generated where half bags were shipped either from or to Arlington and Texas Street in combination with other goods and materials. Thus, in fiscal year 1987, with split-site production, there was a total of 69 tractor-trailer bills of lading generated. In the same period, there were 30 pickup truck deliveries and pick ups.

In fiscal year 1988 (December 1, 1987 through November 30, 1988), there were a total of 23 bills of lading generated at the tractor-trailer level and 3 where half bags were in combination with the other materials. The records, however, demonstrate that the 23 tractor-trailer loads of half bags in fiscal year 1988, included generation of tractor-trailer activity where there was still split-site production (December 1987-January 1988). But even without regard to the weight to be assigned to these numbers, it is evident that the tractor-trailer bills of lading in fiscal year 1988 were only one-third the number of those in fiscal year 1987 because of a full split-site production effort in progress. Similarly, without weighing the figures to show the continuance of split-site production in part, in fiscal 1988, the number of half-bag generated bills of lading on a pickup truck basis diminished to 10 incidents.

While it is true that the dollar value of this diminution of trucking activity between the plants following transfer of the unit work was not produced, it does not necessarily follow, as General Counsel argues (G.C. Br. p. 33) that the saving and shipping costs were ''negligible.'' Whether the shipping costs were ''negligible'' may be; but the record is silent as to what costs were in fact saved by diminution of such trucking activity. In any event, however, the cost associated with diminution of damaged bales and similar costs must be taken into account. Thus I am not convinced by General Counsel's argument that a discriminatory motive should be inferred because Respondent failed to show cost reduction by having the work performed by fewer employees at Texas Street. In view of Respondent's argument supported by the facts, that the transfer to Texas Street was executed without regard to direct employee labor costs, and in view of the presence of the continued argument of Respondent that overall cost and convenience were taken into account, along with noncost factors, I do not conclude that General Counsel's argument either that the reduction in overall costs were ''negligible'' or that merely because the employees to whom the work was assigned at Texas Street were paid at a higher wage level required the drawing of an inference of improper motive.[6]

(4) Respondent deprived employees at its unionized Arlington plant of available work, resulting in an unnecessary shifting of jobs at Arlington and an unnecessary layoff.

I regard General Counsel's argument to be ambiguous. I do not recognize that ''an unnecessary shifting of jobs'' and an ''unnecessary layoff'' demonstrates conduct which runs afoul of the statute, especially its prohibition against discriminatory activity. The uncontradicted record demonstrates that the object, according to General Counsel, of Respondent's discriminatory activity was the employees in the half-bag deparrtment. While it is true that the were deprived of half-bag work, there is no proof that they were deprived of ''available work'' since they were immediately bumped into the production function of bulk bags when the layoff occurred. Not only that, but the alleged object of Respondent's discriminatory ire, within a few months, had average earnings equal, or superior, to that which they enjoyed prior to the *alleged* discriminatory consolidation and transfer of half-bag production. The shifting of jobs became necessary with the transfer of half-bag production to Texas Street.

Also General Counsel's ''unnecessary layoff,'' most importantly, did not affect the alleged object of Respondent's discriminatory ire; rather it affected employees, named in paragraph 14 of the complaint, who were not associated (under the pleadings of proof herein) with any union activity whatsoever. Their union sentiments, of course, were unknown on this record and it might well be that most, or all, them could have been among the 25 unit employees who voted against the Union (Tr. 1116). Under these circumstances, I do not regard the shifting of jobs and the layoffs of employees whose union sentiments are unknown, in the presence of a rather benign effect upon the employees against whom Respondent was allegedly discriminating, to be a convincing argument in favor of an unlawful, discriminatory motive.

(5) Respondent deprived the Union's leading adherents at Arlington of work in which they had acquired considerable experience and with which they were familiar.

---

[6] It seems to me that Respondent is placed in a legal dilemma by General Counsel's arguments. A showing that Respondent transferred unit work to nonunion employees who were paid at *heigher* rates, according to General Counsel, supports an inference of retaliatory and discriminatory motive in violation of Sec. 8(a)(3) of the Act. On the other hand, if General Counsel shows that the transfer of unit work was to employees at Texas Street paid *less than* the employees at Arlington, General Counsel would ordinarily urge this as proof that ''labor costs'' were a significant factor in the decision to transfer the work and thus be evidence of a violation of Sec. 8(a)(5) and (1), if not 8(a)(3), of the Act. *Otis Elevator Co.*, 269 NLRB 891 (1984); *WXON-TV*, 289 NLRB 615 (1988).

This is entirely true under the record herein. Such conduct does not, however, constitute conduct prohibited by the Act nor, in view of the discussion, constitute conduct on which an inference of discriminatory motive might reasonably be drawn.

(6) Respondent precipitously, following selection of the Union by Arlington employees, shifted the work without cost comparisons between performance at Arlington and performance at Texas Street.

General Counsel's use of the word *precipitously* raises the issue of ''timing'' as an element in determining discriminatory motive. This is clearly a reasonable position since adverse employer action immediately following the acquisition of knowledge of employee union activity often demonstrates, sometimes in conjunction with animus and other factors, a retaliatory motive based on the employees' union activity.

The problem in this case however, is that Respondent, whatever its clear union animus, did not embark on a precipitous course of action, retaliating against the Union, *based upon the transfer of unit work.* Rather, the uncontradicted evidence is that as late as December 1987, when Respondent had already decided to seasonally cease half-bag production at Arlington, Respondent told the Union that it intended to resume half-bag production in Arlington in March. There is no suggestion that Scruggs' statement to the Union in that collective-bargaining session was a subterfuge, nor is there any other evidence that Respondent, as late as the end of 1987, had envisioned the transfer of unit work to Texas Street. Therefore General Counsel's argument that Respondent *precipitously* shifted the work is factually unproven because the shift of work did not occur ''precipitously'' following their selection of the union, as General Counsel's argument runs (G.C. Br. p. 32), but was precipitous upon the occurrence of *other* events. Whether the results of the National Cotton Council meeting of March 2 were a genuine basis for Respondent's decision to consolidate half-bag production at Texas Street or provided a convenient pretext is another matter. But that is not what General Counsel's argument in paragraph 6 suggests. In short, General Counsel's argument that there was a precipitous shifting of half-bag production ''following selection of the union by Arlington employees'' is factually unsupported.

(7) Respondent failed to advance a substantial business justification for altering a production system and product system that it had utilized for 2 years.

There is no question that Respondent accepted the inconvenience of split-site half-bag production from June 1986, through early January 1988, when it ceased half-bag production at Arlington. On the other hand, as above noted, there was no indication prior to March l988, that Respondent, in any way coincidental with union activity decided to cease half-bag production at Arlington. General Counsel does not argue that the results of the National Cotton Council meeting of March 2, or Respondent's other arguments are untrue. Thus there is no contradiction of Respondent's testimony that it had open sewing capacity at Texas Street or that further uncontradicted testimony that this resulted from a lessening in demand for both spiral bags and compartmented textile bags at Texas Street. Nor has General Counsel advanced evidence to rebut Respondent's assertion that greater overall efficiency resulted from producing these materials under one roof; that there was less damage in handling, and less cost in shipping. Furthermore, all cotton container materials and products, according to the uncontradicted evidence would now be produced under one roof.

This is not to say that here, as in the case of Teamer and Nabors, above (where only two employees out of 60 were denied overtime work and it was merely coincidental that they were the initial organizers of the union), one must not greet Respondent's arguments with skepticism. An awkward and expensive system with which Respondent was satisfied for almost a 2-year period became sufficiently unsatisfactory to transfer the work to another plant—where the otherwise satisfactory, 2-year work was performed under unionized conditions and the transfer work was not. Yet there was an 8-year history of frequent, almost constant, transfer among Respondent's plants of this half-bag work; and the reasons advanced, contrary to General Counsel's argument, are not insubstantial.

I would conclude in short, that General Counsel, based upon Respondent's expressions of animus alone, together with the other conclusions advanced by General Counsel, may well have proved a prima facie case. But, similar to the case of General Counsel's allegations with regard to Respondent's failure to grant overtime work on October 10, 1987, to Nabors and Teamer, I conclude that General Counsel's prima facie case, was effectively rebutted by Respondent's proof: that the alleged objects of Respondent s discriminatory conduct, the eight employees in the Arlington half-bag operation, received higher pay rates and worked under better working conditions after the transfer of half-bag operations from Arlington; that they worked in bulk-bag operations after the layoff without loss of any pay or any demonstration of adverse effects from the layoff; that the transfer of half-bag operations, per se, had no substantial effect on their wages, hours, or working conditions except to the extent that they benefited from the layoff in those regards, rather than suffered any detriment from them. The transfer of half-bag operations to Texas Street was accompanied by proof of substantial business justification in terms of transportation and handling costs, administrative convenience, the existence of open production capacity in Texas Street, prognostications of future market conditions for half bags and other cotton containers, all against a background of frequent intercity transfer of half-bag production over an 8-year period.

In short, I conclude both that Respondent rebutted the existence of a prima facie case, *NKC of America*, supra, and proved, regardless of the existence of a prima facie case that, in any event, *NLRB v. Transportation Management Corp.*, 462 U.S. at 400–401, supra, it would have transferred the half-bag operations in March 1988, to the Texas Street plant notwithstanding the selection of the Union as the collective-bargaining representative of the Arlington Street employees in the preceding November, 1987.[7]

Whether or not Respondent may have felt little remorse in the transfer, the employees' unionization, I believe, was not a fact in the decision. See *Lignotock Corp.*, 298 NLRB 209

[7] The balance of General Counsel's arguments with regard to Respondent's discriminatory transfer of half-bag operations actually relate to circumstances surrounding the alleged violation of Sec. 8(a)(5) of the Act and do not bear on a violation of Sec. 8(a)(3) which, as General Counsel alleges, requires discriminatory motivation. In addition, there is no evidence that the transfer was due to union animus generally, regardless of a possible punitive interest regarding the half-bag department.

fn. 2 (1990). Further evidence in support of this conclusion is that when the necessity unexpectedly appeared for further half-bag production in September 1988, Respondent immediately reopened production at Arlington.

3. Respondent's refusal to bargain over the decision to transfer half-bag operations alleged as a violation of Section 8(a)(1) and (5) of the Act

On December 31, 1987, during a collective-bargaining session in which the parties discussed the seasonal shutdown of the Arlington half-bag department and the layoff of half-bag department employees, Respondent told the Union that it would resume half-bag production at *Arlington* in March or April of 1988. Further, as above noted, the half-bag employees were then laid off with the cessation of half-bag production, exercised plantwide seniority, and bumped into jobs in Arlington's bulk-bag departhent. This bumping resulted in the layoff of less senior bulk-bag production employees and was the subject of inconclusive negotiations in the winter of 1987, and the early spring of 1988.

On March 24, 1988, again as above noted, Respondent notified the Union that it had decided to produce half bags in the 1988 cotton season at the Texas Street facility. This would result, Respondent said, in cost savings because the product would be manufactured at the point where it is consolidated and shipped and that there were other cost and efficiency considerations weighing in favor of producing half bags at Texas Street. In particular, however, Respondent informed the Union that *labor costs* were not a factor in the decision to relocate the half-bag production and that savings would result from business factors ''over which the union has no control'' (G.C. Exh. 2(N)).

Thereafter, in April 1988, four Texas Street employees were assigned half-bag production. They could not make the 750-bag per 8-hour shift production standard notwithstanding that they worked these functions for 8 weeks.

In working on the half bags, the Texas Street employees utilized the same type of equipment as that used in Arlington to make half bags; there was no purchase of new equipment or outlay of capital expenditures or change or modification in the finished product. The same bottoms and barrels were sewn on sewing machines of the same nature as that in Arlington, and the same sewing of the two pieces occurred in Texas Street as it had in Arlington as well as folding and baling operations. On the other hand, the rates of pay at Texas Street far exceeded those of the half-bag sewers at Arlington (i.e., Odessa Thompson at Texas Street earned $6.05 per hour making half bags after the relocation; the highest paid Arlington half-bag employees, Benson and Harwell, earned $4.96 and $5.04, respectively as half-bag production employees (R. Exh. 41).

General Counsel notes that Respondent made no cost comparison concerning savings at the two locations prior to the date of the decision (Tr. 485); and observes that Respondent's answer admits that it transferred the half-bag production from a union to a nonunion facility without affording the Union an opportunity to bargain over the *decision* to transfer such work (compare G.C. Exh. 1(W), third consolidated complaint, par. 15(A), with Respondent's answer, G.C. Exh. 1(bb), par. 15).

Respondent's position, inter alia, is that since the decision did not *turn on* labor costs, the *decision* to relocate the half-bag production was not a mandatory subject of bargaining and therefore could be effectuated without notification to, or bargaining in good faith to impasse with, the Union.

In support of this position, Respondent points to the several historical switches of half-bag production over the years in Respondent's various plants since 1981, when all half-bag production had been centered at the Texas Street facility. Further, it cites the fact that of the 10 manufacturing steps required at Arlington, starting with the receipt of rolls of polypropylene from suppliers at Texas Street (with reshipment to Arlington and ending with warehousing of finished bales of half-bags, again, at Texas Street, only 5 such production steps were required where production occurred at Texas Street.

Moreover, Respondent notes that it would save money on any drop-shipment costs where any materials were drop-shipped from South Carolina and Georgia polypropylene suppliers at the Arlington plant on the way to the Texas Street plant; and would further save transportation costs involved in the trucking of materials from the Texas Street plant to the Arlington plant. Respondent also points out that the printing (of the material manufacturer's name and Responent's name) on the finished bag was performed only at Texas Street and that there was no such printer at Arlington. A new printer would cost approximately $7000, and Respondent avoided that capital cost consolidating half-bag production at Texas Street. In addition, half bags as well as bulk bags are cut on the Weist machine. Although there are Weist machines at both Arlington and Texas Street (the Weist machine costs approximately $27,000), bulk-bag production at Arlington had increased so significantly that the Weist machine at Arlington was often fully utilized solely for the cutting of bulk bags. The Weist machine at Texas Street, on the other hand, was not fully utilized because of the diminution in demand for Texas Street-produced spiral bags and half bags. Thus the Texas Street Weist machine had open production time whereas the Arlington Weist machine did not. Respondent further points out that with the consolidation and relocation of half-bag production, all cotton packaging products could be produced at Texas Street.

Lastly, Respondent notes that while it expected to resume half-bag production at Arlington as late as December 31, by early March 1988, it had in its possession not only the results of the cotton crop and packaging demand predictions of the March 2, 1988 meeting of the National Cotton Council but in view of the need for expeditious decision making, it had the memos from Vice President George Smith (March 3, 1988) and Don Wiseman (March 8), both recommending half-bag transfer and production to Texas Street (R. Exh. 15 and 1).

Discussion and Conclusions

To the extent General Counsel argues that production went from a unionized unit to a nonunionized unit and from experienced personnel to inexperienced personnel and from personnel who were able to make incentive production standards, to those who, after an 8-week period, were unable to make production standards, these arguments are essentially those in favor of a finding of discriminatory motivation. This element has been dealt with above. Given the existence of Respondent's union animus, I have examined Respondent's proof with some skepticism. However, I have found that

General Counsel has failed to prove, by a preponderance of the credible evidence, that Respondent was possessed of such discriminatory and unlawful motive in the relocation of half-bag production to Texas Street.

General Counsel accurately observes, on the other hand, that the half-bag work at Texas Street as in Arlington, utilized the same equipment (sewing machines, cutting machines, and a baler); required no new purchase of equipment, no outlay of capital expenditures; of change or modification in the finished product. Indeed, the employees worked on the same types of sewing machines which had been utilized at Arlington. They used the same sewing process on the same materials and turned out the same half bag. In addition, the manufacturing operation using sewing ''folders'' was essentially the same as using sewing ''helpers'' at Arlington. While General Counsel concedes that the rates of pay to the employees at Texas Street *exceeded* those at Arlington, General Counsel observes that such higher Texas Street pay rates were predicated on production rates of Texas Street employees working on bags different from half bags (G.C. Br. p. 9). Such an argument, of course, tends to work in favor of Respondent's position: that labor costs were not a consideration in the decision to relocate the work to Texas Street since the relocation was made to Texas Street *regardless* of the inexperience of Texas Street employees, regardless of the higher pay rate, and regardless of the basis on which the rates had been established. Thus, Respondent's willingness to pay higher wage rates demonstrates an *indifference* to the level of labor cost rather having labor cost play a predominant roll in the decision to relocate to Texas Street.

More telling is General Counsel's argument that the split production site had been in effect since the initiation of Arlington half-bag production in the spring of 1986. Thus the costs of transportation from suppliers and the costs of interplant transportation as well as the damage to goods and other inconveniences had been in effect for a year-and-a-half prior to the decision to relocate half-bag production. In addition, Respondent's argument in favor of the need for speed in the decision to consolidate production without notifying or bargaining with the Union is unconvincing. If Respondent was, indeed, indifferent to labor cost, and was faced with a need for a speedy initiation of spring production to meet the need for cotton packaging in the period April-November, 1988, it might well have left the production process in situ rather than shift prodution into inexperienced and untrained hands, which production showed itself to be a failure in the ensuing 8 weeks of using the new, higher paid sewers and helpers at Texas Street.

What actually precipitated the decision, according to Respondent, was newly excess production capacity at Texas Street, the declining use of half bags in general (lower use estimates), and the excessive trucking and handling of the product between Texas Street and Arlington (R. Br. p. 1). In addition, Respondent argues that to maintain half-bag production at Arlington would require *manual* cutting of half bags because the Arlington Weist machine was of fully utilized. The alternative was to hand-cut the half bags (an impractical alternative) or to invest in a further Weist machine at Arlington at a cost of $27,000. Lastly, as Respondent argues, it was more convenient to produce half bags at Texas Street because not only was there the attractiveness of all cotton packaging under one roof, but there was also only one available printing machine and that was at Texas Street. This last argument, it seems to me, is hardly forceful. Split-site production had been engaged in for 18 months, with the only printer at Texas Street. This is not an argument in favor of relocating all production to Texas Street. On the other hand, Respondent's production supervisors supported Langston's proposal that production be consolidated at Texas Street.

In short, General Counsel argues that the change in location of the sewing, folding, and baling functions resulted in no change in the finished product, required no outlays of capital, required no change in production equipment, required no change in the manner of production, and since the product was the same, was not evidence of a change in the direction of Respondent's business.

On the basis of the above findings, however, I conclude that General Counsel has failed to prove by a preponderance of the evidence, that *labor costs* were a significant factor in the decision to relocate the half-bag operation from Arlington to Texas Street. The evidence shows that the Texas Street employees who, after volunteering, were assigned the substituted work, were paid at the rate of approximately $6 an hour as opposed to the rate of approximately $5 per hour at Arlington. Therefore, not only was labor cost saving not demonstrated to be a factor by extrinsic evidence, but the evidence shows that the transfer of unit work occurred *in spite of higher labor cost* at Texas Street. In addition, while no savings were shown on manufacturing (''unit costs''), the evidence showed diminished interplant transfers; and notwithstanding that General Counsel characterized the savings resulting therefrom as ''negligible,'' the diminution in the number of interplant transfers themselves, would indicate some unit cost savings in ultimate manufacturing.

In addition, General Counsel failed to meet Respondent's testimony that it had suffered damage to the baleed half-bags by excessive interplant handling; that it had open production capacity at Texas Street for whatever reason, including the expected downturn in demand for half bags and spiral bags and the diminution in demand for its textile bag production; and Respondent's assertion that Weist machine usage at Arlington had reached such proportions that it would require manual cutting or investment in a further Weist machine if half-bag cutting was to be continued at Arlington. Although I was not much impressed with the fact that the only printing machine was at Texas Street, and that it was valued at about $7000, it could surely argued that as a matter of convenience alone, and in spite of the 18 months during which Respondent had faced split-site production, was more convenient to maintain printing at Texas Street.

While General Counsel failed to prove that labor costs were a significant factor in the decision to relocate; and while Respondent demonstrated the existence of other factors (excessive handling, manufacturing convenience, decrease in transportation, open production capacity) over which the union had no control, Respondent did not show a change in the nature or direction of Respondent's business or items such as technological innovation requiring the change, the creation of a new product, or the loss of some important customer which required product relocation.

In short, with regard to Respondent's arguments, I have already noted that General Counsel has failed to prove, by a preponderance of the evidence, that labor costs constituted a significant factor in Respondent's decision to relocate half-

bag production. On the other hand, I am not impressed by Respondent's arguments of time being of the essence since it could have permitted the production situs to remain in Arlington if time was truly of the essence; and I am not impressed with Respondent's overall arguments of avoidance of injury to baleed half bags and the savings (actually unproven) to be garnered by having single-site production because there would be no interplant trucking costs and drop charges. These latter arguments pale because those circumstances were in existence for 18 months and if those cost-cutting circumstances were important, much less dispositive, in Respondent's evaluation of eliminating split-site production, such considerations would have come into play long before the 18 months during which half-bag production remained in Arlington. On the other side of Respondent's ledger, however, stands the undisputed evidence of the results of the National Cotton Council's predictions of half-bag demand; the diminution of textile-bag and spiral-bag production, Texas Street; anticipated production capacity at Texas Street; and the increased utilization of Weis cutting machine capacity at Arlington due to greater bulk-bag production.

The legal issue presented is whether under the above circumstances, Respondent's *decision* to relocate half-bag production to Texas Street was a mandatory subject of bargaining. A subsidiary statement of the legal issue is: (1) whether General Counsel's faiure to prove that labor costs were a significant element in the decision to relocate per se is sufficient to conclude, as a matter of law, that the relocation decision was not a mandatory subject of bargaining; of (2) whether, in conjunction with General Counsel's failure to prove that labor costs constituted a significant factor in the decision to relocate, Respondent's manufacturing *convenience*, together with some showing of an avoidance of capital outlay and a showing of manufacturing and operational desirability (ranging from open manufacturing capacity at Texas Street to the logistical preference of all cotton packaging under one roof), in the alternative, is sufficient to eliminate the conclusion that the decision constituted a manditory subject of bargaining.

In support of his conclusion that the decision to relocate half-bag production constituted a mandatory subject of bargaining, General Counsel cites only *Pertec Computer*, 284 NLRB 810 (1987). In that case, the Board found that the employer's refusal to bargain on a decision to relocate its operation constituted a violation of Section 8(a)(5) and (1) of the Act because the decision to relocate was found to be a mandatory subject of bargaining. General Counsel's extensive quotation from the case, however, omits the Board's statement that: ''The primacy of labor cost in the decision to shift work out of the plant is not seriously disputed.'' Ibid. On such a Board statement, General Counsel's citation of this case as support is wholly misplaced for, in the instant case, I have concluded, that the General Counsel has failed to prove that labor costs were a significant factor in the decision to relocate.

Fibreboard Corp. v. NLRB, 379 U.S. 203, 213 (1964), is instructive perhaps only on the basis of facts distinguishing it from the instant case. There, the subcontracting of unit maintenance work was held a mandatory subject of bargaining under Section 8(d) but labor costs were apparently at the heart of the decision (379 U.S. at 206–207). In the instant case, however, there is not even a ''contracting out'' of the work; Respondent's own, nonunion employees are doing the same work. On the other hand, unlike *Fibreboard*, the work is not being done in the same plant; the whole object is to relocate to an under utilized production facility where trucking costs, handling problems, and other nonlabor cost items would offset the higher direct labor costs the nonunionized wages at the relocated plant. A relocation decision to replace antiquated machinery was held not to be a mandatory subject of bargaining notwithstanding thc employer's history of a desire to reduce labor costs, *Inland Steel Container Co.*, 275 NLRB 929, 935–936 fn. 15, 937 (1985). Finally, in *Otis Elevator II*, 269 NLRB 891 (1984), the Board excludes from mandatory subjects (*Otis Elevator II*, supra at 3 fn. 5) ''[Decisions] . . . to restructure or to consolidate operations . . . .'' Apparently such a conclusion meets the standard of ''a change in the nature or direction of the business.'' *Otis Elevator II*, at 89l–892. Whatever else Respondent's relocation and consolidation of half-bag operations at Texas Street constituted, it certainly resulted from a decision to ''consolidate'' operations within the above controlling Board rule.

In the absence of controlling Board authority to the contrary, and taking the above factors into account, I conclude that General Counsel's failure to prove that labor costs were a factor in Respondent's decision to relocate half-bag production from the unionized plant to the nonunionized plant, alone, disposes of the question of whether Respondent 's decision was a mandatory subject of bargaining under *Otis Elevator II*, supra, and its progeny.

The Board's gloss on *Otis Elevator II*, supra, continues to show the requirement that a mandatory subject include the object of reducing labor costs. Thus in *Lapeer Foundry & Machine*, 289 NLRB 952 (1988), a layoff of unit employees resulting from a lack of orders was determined to be a mandatory subject of bargaining since the Respondent's decision was *not* to change the nature or scope of the business. It was held, rather, to constitute a change in terms of employment in order to reduce labor costs ''during a period of economic difficulty.'' In *WXON-TV*, 289 NLRB 615 (1988), the Board held that the decision to eliminate the production department from a television broadcast operation was not a mandatory subject of bargaining. In that case, in citing *Otis Elevator*, the Board held that an employer's decisions which affect the basic direction or nature of the business are excluded from the mandatory bargaining subjects described in Section 8(d). In the next sentence, however, the Board goes on to say that the critical factor in the Board plurality in *Otis Elevator*, is whether the decision turns upon a change in the nature or direction of the business of turns upon *labor costs*. In *Inland Steel Container Co.*, supra, enfd. sub nom. *Steelworkers Local 2179 v. NLRB*, 822 F.2d 559 (5th Cir. 1987), the circuit court found that the administrative law judge's conclusion that the decision to relocate ''did not turn upon labor cost'' was dispositive.

Under all the above circumstances, I conclude that Respondent's decision to relocate half-bag production from the unionized Arlington to the unionized Texas Street facility was not a mandatory subject of bargaining. I therefore recommend that the allegation of violation of Section 8(a)(1) and (5) of the Act be dismissed.[8]

[8] General Counsel does not allege a violation from the failure of Respondent to offer to engage in ''effects bargaining'' over the relocation of half-bag production to Texas Street. In the absence of such an allegation, no violation over

4. Respondent's alleged violation of Section 8(a)(1) and (5) of the Act in its refusal of the Union's request, to furnish information necessary to bargain over the decision to transfer unit work

It is undisputed that on March 24, 1988, Respondent, without prior notification or bargaining, notified the Union of its decision to produce half bags in 1988 at the Texas Street facility (G.C. Exh. 2(n)).

On April 11, the Union stated that, in order to effectively represent its members and protect their jobs, it was requesting that Respondent immediately provide the Union with 18 items of information regarding the transfer of half- bag production from Arlington to Texas Street (G.C. Exh. 2(o)).

On May 23, 1988, Respondent answered the Union's request (G.C. Exh. 2(p)), by giving some information, refusing to give other information on the ground of irrelevancy to ''any mandatory subject of bargaining,'' burdensomeness, and on the ground that Respondent was asking for information regarding the Respondent's *decision* to relocate. After stating that it considered the issue of the decision to relocate to be irrelevant, Respondent nevertheless supplied the union with reasons for the *decision* to relocate half-bag production to Texas Street. Lastly, it failed and refused to provide certain information on the ground that it was not in its possession at the time.

By virtue of paragraphs 16, 17, and 18 of the third consolidated complaint, General Counsel alleges violation of Section 8(a)(1) and (5) of the Act in Respondent's failure to provide the Union with the 18 elements of information because the requested information was relevant to the Union's performance of its function as the exclusive collective-bargaining representative with regard to Respondent's *decision to transfer unit work.* In view of the disposition above that the decision to relocate half-bag production to Texas Street was neither discriminatorily motivated (and unlawful within the meaning of Section 8(a)(1) and (3) of the Act) nor a mandatory subject of bargaining within the meaning of Section 8(d) of the Act and therefore Respondent's failure to bargain thereon wa not a violation of Section 8(a)(1) and (5) of the Act, I conclude that the requested information was not relevant to the execution of the Union's duty as statutory collective-bargaining representative. Nor has General Counsel shown why the information is otherwise relevant. *NLRB v. Rockwell Standard Co.*, 410 F.2d 953, 957 (6th Cir. 1969).

To the extent, therefore the General Counsel alleges that Respondent was obliged to supply information relating to the ''decision'' to relocate, I recommend that the allegations in Paragraphs 16 and 18 of the third consolidated complaint be dismissed.

5. Alleged violation of Section 8(a)(1) and (5) of the Act by Respondent's delay in furnishing the Union with requested information regarding Respondent's existing incentive system; and its failure to furnish the Union with requested timestudies utilized in establishing Respondent's existing incentive system (third consolidated complaint, pars. 19, 20, and 21)

As above noted, on December 7, 1987, having received the Regional Director's December 3, 1987 certification of the Union as collective-bargaining representative, Respondent notified the Union that it was recognizing the Union and would bargain with it in the production and maintenance unit. Respondent said that it stood ready to commence negotiations at a mutually convenient date and place and assumed that ''you will first request certain data concerning the bargaining unit so that you might better prepare for negotiations.'' (G.C. Exh. 2(B).)

On December 10, 1987, the Union suggested dates for the commencement of bargaining (January 7 and 12) and requested, in paragraphs, various information from Respondent, including, with regard to wages, ''copies of all production quotas by departments and styles, and copies of formulas, time studies, etc., used in determining each production quota.'' (G.C. Exh. 2(A).)

In fact, however, the parties had met in collective bargaining as early as December 31, 1987, and again on January 15, 1988. At the latter session, Respondent furnished the Union with a list of categories of employees employed in both bulk bag and half-bag production together with their wage rates (G.C. Exh. 3(A)), many of which were incentive rates for production in addition to the underlying hourly rates. It also provided the Union, pursuant to the union's December 10 request, 31 pages of documents (G.C. Exh. 3(D)). These documents broke down various incentive rated jobs into operations. These ''operations,'' on the face of the documents, were further broken down into ''elements'' of each particularized cutting and sewing ''operation.'' Next to each element there appears a fractional part of a minute required for the execution of each job element as part of the overall operation. At the bottom of each page, there appeared the total time required for execution of the various operational elements required for each ''operation.'' The documents covered various cutting, sewing, and inspection activity in half-bag and bulk bag production.

Lowell Daily, secretary-treasurer, Furniture Workers Division, I.U.E., parent of Charging Party Local 282, for more than 28 years was involved in negotiations and arbitrations concerning the basis of wages and wage rates: stop watch studies, motion systems, and the use ''standard data'' (production quotas). Daily first became involved in bargaining with Respondent in late June 1988, when the president of the Furniture Workers Division, I.U.E., received a call from Local 282 President Willie Rudd saying that he had a *time-study system* that he could not understand. Rudd asked the division president (Scarborough) to ''send him someone who'd handle it'' and suggested sending Daily (Tr. 544). Daily then met with the Local, reviewed the material that

---

the failure to bargain on ''effects'' may be predicated, *WXON-TV*, supra. In any event, Respondent consistently offered to bargain on effects of the decision.

Respondent had provided, including as will hereafter be seen, Respondent's offer on wages of March 22, 1988, and decided that there were a number of questions that he had with regard to the material provided.[9] Together with Local Union President Willie Rudd, he then prepared a letter to Respondent over Rudd's signature (G.C. Exh. 3(i)). The Union requested 16 items including (1) the master data for each element including all the timestudies or any other data from which the standard time for each numbered element was derived and each element and number; (2) the formulas, processes, or equations used to determine the standard time for each numbered element and used to determine the moneys paid for extra units of production; (3) the data used to change the standard for each job; (4) the formula used to calculate wages from the above data; (5) any motion pattern standard data or stopwatch studies used to support this data; (6) the existence of any allowance for fatigue, unavoidable delay, or personal time and how such allowances applied; (7) whether Respondent paid for breaks or washup periods and whether this was reflected in the data; (8) the time required for the employee to get raw materials and remove finished goods which times are not shown in the element descriptions; (9) whether the standard time for each element was based on stopwatch studies or standard data; (10) it appeared that certain standards which appeared in documents supplied by Respondent did not appear in Respondent's proposed standard sheets and the Union wanted to known the status of that data and whether there had been any transfer of work to other company plants, etc.

Respondent received the Union's June 29 letter on July 5 an made internal inquiry in order to respond to the 16 paragraphs (most which are set forth above) requesting information of Respondent. Respondent's reply (G.C. Exh. 3(J)) of July 11 contains 16 numbered paragraphs.

As a first matter, Respondent wrote that: ''available additional worksheets involved in the original timestudies will be provided.'' In subsequent numbered paragraphs, Respondent appeared to answer the Union's numbered paragraphs. With respect to (2) above, it appeared to describe how it computed the ''job standard'' and observed that the computations of job standards had already been provided in the materials furnished on January 15. With regard to the formula for computing the moneys for extra units, that information was provided. (4) Respondent stated that it used actual production records to support the revised job standards in its March 22 wage offer.[10]

With regard to other items, Respondent described the computation of the monthly wage adjustment for incentive rates and observed, inter alia, that the original standards for the existing incentive wage rates were ''established from stopwatch studies using sound industrial engineering practices.'' In addition, where Respondent was unsure as to exactly what the Union wanted, it asked for further information and stated that it would respond.

On July 22, 1988, Respondent submitted to the Union its ''final contract proposals'' which, with regard to production standards, reoffered the production standards set forth in its March 22 and April 1 wage proposals.

As General Counsel notes, George Smith, Respondent's supervisor who created the Respondent's present wage offers, did not testify. Respondent's chief negotiator, Attorney John Scruggs, testified that Smith had used daily production reports submitted by unit employees (i.e., actual production statistics) as the basis of Respondent's present incentive wage offers rather than time motion studies (which had formed the basis of incentive wage rates commencing in 1985). When Scruggs presented the Respondent's ''final contract proposals'' on July 22, he told the Union that Respondent would make no further proposals or concessions but was present, on July 22, to answer the Union's questions about Respondent's final contract proposal so that the Union might understand and evaluate it. Scruggs admitted (Tr. 202) that in order for an agreement to be reached on wage rates, the Union would have to accept Respondent's proposed production standards (Tr. 202).

At the July 22 collective-bargaining session, the first meeting at which Lowell Daily was present, the Respondent's wage and production standards were discussed and the Union, citing Respondent's July 11 letter (''available additional worksheets involved in the original timestudies will be provided'') told Respondent that the Union didn't have the information which Respondent said it would provide and the Union asked again for the information. Scruggs told the Union that he did not have any further information; that he had already given the Union what information he had. He said, however, that he might be willing to look again for other documents (Tr. 550–551). Scruggs' willingness to look for further documents apparently stemmed from Daily showing him a blank form (G.C. Exh. 7) and telling him that any document consistent with or containing the type of information appearing on that form would be acceptable (Tr. 552).

Meanwhile, the Union questioned Scruggs at the July 22 meeting, on some of his answers provided, above, in his letter of July 11 (G.C. Exh. 3(J)). In particular, the Union pointed to Respondent's answer concerning the derivation of the original standards in Respondent's existing incentive rates, where Respondent had answered, in its July 11 letter, that they were established from stopwatch studies ''using sound industrial engineering practices.'' As Daily testified, the timestudies themselves were needed in order to determine, inter alia, how the incentive rates that existed in Respondent's plant compared to Respondent's contract offers; to determine whether the timestudies themselves were accurate (''legitimate''); and to determine whether the incentive rates should be changed in whole or in part. Consistent with the Union's demand for the timestudies, it requested, as part of the contract, that job standards would be based on ''sound industrial engineering practices.'' Scruggs refused. With regard to some of the questions asked by the Union, Respondent, through Scruggs and its personnel director, did not understand the questions (Tr. 553–554).

The meeting concluded with Daily asking to meet with George Smith and for the Union to be able to go to the plant and check some of the rates which had been provided in documents from Respondent.

On August 16, 1988, the Union, including Daily, visited the plant. However they met only Scruggs who told them that Smith was not available (Tr. 55). Scruggs and Daily, nevertheless, checked the number of jobs and thereafter Scruggs, Leachman, and Daily, together with an employee

[9] Daily's testimony whether the materials were audit sheets or timestudies or both was unclear.

[10] Respondent's original wage offer was made on March 22, 1988, a revised offer on April 1, 1988, and a ''final offer'' on July 22, 1988.

from the bargaining unit, asked Scruggs some timestudy questions. Scruggs refused to answer (Tr. 557) any timestudy questions on the ground that he was not a timestudy man. When the Union asked him if he had the timestudy documents, Scruggs said that he did not but said that the Union would get it (Tr. 557).

Although there were a couple of other meetings, Daily could recall what occurred at the August 29 collective-bargaining session. At the August 29 meeting, Daily told Scruggs that he still didn't have the timestudies and had only the materials furnished in January (G.C. Exh. 3(D)). At that meeting, on August 29, however, Respondent furnished at least part of the promised timestudy and job description materials (Tr. 560).

There is a dispute as to when, during this August 29 meetings Respondent furnished the materials. Although the parties agree that the meeting started about 5 p.m., and that the materials were given by Scruggs to Daily about 7 or 7:30 p.m., the parties are in dispute as to whether the documents were given during a recess and whether collective bargaining continued thereafter past 9 p.m. (according to Scruggs, Tr. 221–222) or whether Scruggs gave the documents to Daily and that the meeting concluded immediately with that event (according to the Union).

At both the July 22 and August 29 meetings, Daily told Respondent that Smith's proposed incentive pay rate was not only less reliable than the timestudy method on which Respondent's existing incentive rates were based, but would effectively constitute a cut in pay for some employees. As to them, they would have to work harder in order to enjoy the same pay or, alternatively, if they worked at the same pace, they would receive less pay.

Scruggs testified that the job data sheets provided to the Union on August 29 were ultimately found by George Smith on the very day of the August 29 collective-bargaining session and that they were delivered to Scruggs at a time when he did not have an opportunity to inspect them. He handed them over to Daily, he testified, without a thorough inspection about 7:30 during a recess and that the Union itself did not have an opportunity to study the sheets prior to the end of the meeting. Scruggs testified that one of the problems with the delivery of these job data sheets was that the Union had asked for Respondent's ''Master Data Element Books'' on June 21 (Tr. 228) as backup sheets on the time motion studies. George Smith told Scruggs that Respondent did not have any master data element books. Scruggs testified that at the July 22 meeting, the Union then asked for ''Standard Data Element Books.'' Scruggs said that he informed Smith of this change and that on August 29 Smith came up with the job element sheets which were delivered to the Union during the collective-bargaining session. Scruggs concedes that it took Smith roughly a month to come up with the data (Tr. 229).

In the meantime, however, when Daily had requested the Standard Data Book at the meeting on July 22, Respondent answered, in writing, on July 27 (G.C. Exh. 3(L)). Respondent failed to state that such a book or such data did not exist; rather, Scruggs questioned the relevancy of the request on the ground that

> it is not the original job standards that are at issue in these negotiations—the issue is the Company's proposed standards. And the Company's proposed standards were *not* derived from the previous standards, nor are they revisions of the prior standards. The Company's proposed standards were derived from an analysis of the *actual production history* at the Arlington plant. We have furnished you with the actual production statistics that were used as the basis for formulation of the company's proposed standards. The old job studies initially done at the Arlington plant were not considered in any way in the formulation of the proposed standards.[11]

Respondent again raised the question of relevancy at the August 29 collective-bargaining session at which it was represented not only by Scruggs and Personnel Manager Ron Wargo, but for the first time by Vice President George Smith. When the documents were given to the Union, the Union could not reproduce them because its copying machine had broken and the Union did not return the sheets to Respondent. At the end of the August 29 meeting, there was no agreement or discussion concerning a further meeting or the issues separating the parties.

On August 31, 1988, the Union filed a charge alleging violation of Section 8(a)(1), (3), and (5) of the Act asserting Respondent engaged in bad-faith and surface bargaining, and failing to furnish relevant information and other acts of unlawful conduct. The charge was served on or about September 1 with a first amended charge filed and served on October 27 and 28, respectively; and the Regional Director issued a consolidated complaint alleging, inter alia, the failure to provide information and a failure to bargain in good faith, etc. on October 28, 1988 (G.C. Exh. 1(j)).

On September 6, 1988, Respondent replied to a union letter of August 31 in which the Union accused Respondent of bad-faith bargaining. Respondent characterized the Union's letter as containing numerous erroneous assertions and self-serving statements. Respondent stated in this September 6 letter (G.C. Exh. 3(N)):

> As I have said on several occasions since tendering our final proposals package [on July 22], these are the Company's final positions and we have no present intention of making any further concessions. We stand ready to answer the Union's questions about our proposals so that you may understand them and make an informed decision as to the Union's response. You mischaracterize our position as a refusal to bargain, which it is not.
>
> We have bargained in good faith with the Union in 22 sessions since 1987.

Furthermore, Respondent admonished the Union for failing to have Lowell Daily make further trips to Respondent's plant to study the jobs. Respondent states that instead of exercising this opportunity Daily ''devotes himself exclusively to dissecting a 3-year-old job study—a study which the Company has told him time and again was not used as a basis for its current job standard proposal.''

Respondent, in addition, admits that it

[11] The General Counsel concedes that Respondent's 1988 offer on production standards is not unlawful (Tr. 231).

> erred when I informed the Union on July 22, that we did not maintain a copy of the 1985 study's standard data sheets. This error was remedied when we located the standard data forms and supplied copies to the union [on August 29, 1988]. The Company has consistently objected to the relevancy of these inquiries, but when Mr. Daily indicated that he wants the information anyway, we have consistently complied. All the while, our offers for the union to conduct its own studies continued to be ignored.
>
> I interpret the final three paragraphs of the August 31 letter as a rejection of the Company's final proposal package. Only if we accept the Union's request to reconsider our final position are we invited to continue negotiations. Since the Company has no present intention of making further concessions from its final proposal package submitted July 22, it appears to me we are at impasse. If my understanding is correct, there is no reason for us to meet further until one party or the other is ready to change its bargaining position. If my understanding is not correct, please let me know. Otherwise, the Union is invited to contact me when you are prepared to accept our final offer.

With the issuance of complaint on October 28, Respondent ''reconsidered its position,'' struck the word ''Final'' from its July 22 ''Final'' contract proposal, and the parties resumed bargaining on November 16, 1988 (Tr. 245).[12] Collective bargaining continued various issues through the end of December 1988 and into early 1989, but no overall agreement was reached.

Discussion and Conclusions

With respect to the allegation in paragraph 24(b)(2), that Respondent refused unlawfully to bargain between September 6 and November 16, 1988, I find that it did unlawfully refuse to bargain but not on the basis of the refusal to grant requested information. Rather it is on the ground, as will be seen hereafter, that the parties did not reach lawful impasse because of Respondent's acts of bad-faith bargaining occurring before its September 6 letter in which it claimed the existence of impasse. Indeed, I find that, as a matter of law, it is actually unnecessary to pass on the existence of an ''*impasse*'' since any such impasse was based on acts of bad-faith bargaining in violation of Section 8(a)(5) and (1) of the Act. Compare *Pillow Corp.*, 241 NLRB 40 fn. 1, enfd. 615 F.2d 917 (5th Cir. 1980), with *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1187 fn. 16 (5th Cir. 1982), and *NLRB v. Big Three Industries*, 497 F.2d 43 (5th Cir. 1974) (good-faith bargaining is prerequisite to valid impasse). Thus, Respondent may not defend an allegation of refusal to bargain based on impasse because its own unfair labor practices precluded its defense.

With respect to Respondent's alleged failure to provide information, General Counsel's position is that the Respondent could not lawfully withhold the timestudies used by Respondent in implementing its existing incentive system and, in addition, could not lawfully delay furnishing the Union with the master data or timestudy elements. General Counsel argues that the chronology of events show that Respondent's delay in furnishing the timestudy elements and the failure to provide the actual timestudies frustrated bargaining and demonstrates that no valid impasse had been reached at the time Scruggs made his declaration of impasse on September 6 (following its July 22 ''last offer'').

As a preliminary matter, the General Counsel cites the fact that the Union, at the outset of bargaining, in December 1987, requested the timestudies and ''detailed related information.'' General Counsel urges that this information is clearly relevant.

Respondent's defenses, essentially are that (1) the information was irrelevant to collective bargaining and therefore Respondent was under no duty to supply it; and (2) in any event, Respondent supplied the information requested (R. Br. p. 24).

a. *Relevance*

With regard to ''relevance,'' it is clear that Respondent's defense on this basis misconceives its bargaining obligation and the relevance of the requested material. Over and over again, Respondent argued at the hearing, and again in brief, that its wage rate offer was not based, in any way, on the 1985 time motion studies and the job descriptions resulting therefrom; rather, its offer was based on the actual production figures, gathered by Vice President George Smith. Hence, Respondent has continually argued that the Union's request for time motion studies constituted an irrelevancy under the existing bargaining situation. Nothing could be a clearer statement of Respondent's position than its letter to the Union of September 6, 1988, in which it declared impasse (G.C. Exh. 3N):

> The Union's industrial engineering specialist has, in our opinion, devoted an inordinate amount of time to analyzing the technical aspect of the original time study done in the plant in 1985—but we advised the Union 20 months ago that our wages and job standard proposal was based upon the actual production at the plant, not a revision of the original timestudy. . . . [and] Mr. Daily devotes himself exclusively to dissecting a 3-year old job study—a study which the Company has told him time and again was not used in any way as a basis for its current job standard proposal.

It is quite true that the prior timestudies and associated materials are not relevant to Respondent's current offer. But Respondent's offer is not the exclusive element of collective bargaining on wages. Rather, the Union has a right to bargain. It has a right to propound, among other things, that Respondent's *existing* wage incentive plan and wage rates remain in effect rather than Respondent's new proposal based on actual production. While the bargaining, essentially, related almost exclusively to Respondent's wage proposal, this does not make the Union's position insignificant or, as Respondent would have it, ''irrelevant.'' For assuming, arguendo, that the Union's request relates to a desire to compare existing methods and bases of compensation with Re-

[12] The third consolidated complaint par. 24(b)(2) alleges that ''between September 6, 1988 and November 16, 1988, Respondent violated Sec. 8(a)(1) and (5) of the Act by failing to meet with the Union at reasonable times.'' It may also be noted at a discussion between the parties on September 22, 1988, was not a contract bargaining session, but was limited only to the notification and discussion of Respondent's resuming half-bag production at Arlington in September.

spondent's new offer, and assuming, further, that the Union, as a counteroffer would demand maintenance of the status quo the requested information is not irrelevant. Thus, even if the requested information is essentially to support the Union's counteroffer rather than to refine Respondent's offer, since the information is wholly in Respondent possession, it should be supplied.

In short, the Union is a statutory partner in terms of the 8(d) aspect of the obligation to bargain in good faith and Respondent cannot, by insisting upon bargaining on *its* offer, eliminate the information requests made in good faith by the Union as ''irrelevant.'' Thus, to the extent Respondent argues that the material demanded by the Union is irrelevant, such an argument misconceives Respondent's obligation to its bargaining partner's ability to perform *its* duties under the statute. The time motion studies and other requested materials are clearly relevant at least to the Union's assertion that Respondent's proposed wage offer, in part, represents a wage cut from existing rates, an assertion that Respondent does not deny. The requested information is relevant to the Union's ability to bargain for its proposal and against Respondent's proposal. *NLRB v. Acme Industrial, Inc.*, 385 U.S. 432, 435–436 (1967). *Detroit Edison Co v. NLRB*, 440 U.S. 301, 303 (1979).

b. *Stopwatch worksheets*

Respondent, in its July 11, 1988 letter (G.C. Exh. 3(J)), not only notified the Union that ''available additional work sheets involved in the original timestudies will be provided'' but appeared to state, at all junctures and bargaining, that the wage rates were indeed based on 1985 timestudies and resulting standard data information based on the timestudies. As Respondent noted in the July 22 collective-bargaining session, it erred in informing the Union that Respondent did not retain a copy of the 1985 timestudy standard data sheets. At the July 22 collective-bargaining session, however, when Scruggs told Union Negotiator Daily that Respondent had no further data, he nevertheless said he would be willing to look again for the standard data sheets (Tr. 550–551). He never did find these basic stopwatch timestudies and these were never surrendered to the Union. The only evidence of record is that, at Scruggs' suggestion, Smith made further efforts to locate existing materials relating to the timestudies and, on August 29, came up with the standard data forms which were supplied to the Union on that date. In the absence of evidence that Respondent had been or was hiding the underlying timestudies, its failure to supply them does not violate the Act. It could not find them. To the extent General Counsel urges otherwise, I must reject that argument as unproven and recommend to the Board that to the extent that Respondent failed to supply the *stopwatch studies*, it was privileged to do so because it did not have them, on the facts of this record. It discovered the standard data sheets and gave them to the Union when it found them. Absent contrary evidence, I find Respondent's testimony to be credible.

c. *Respondent's delay in supplying the Union with the master data sheets, a/k/a standard data forms*

Pursuant to the Union's December 10, 1987, opening request for information, including ''8. copies of all production quotas . . . and copies of formulas, time studies, etc., used in determining each production quota'' (G.C. Exh. 2(A)), Respondent, as requested, provided the Union, at the first collective-bargaining session on January 15, 1988, with the pay rates of Arlington unit employees (G.C. Exh. 3(A)), and the 31-page packet of ''timestudies'' (G.C. Exh. 3(D)). That document contains the element descriptions of all unit jobs, including incentive rated jobs, together with apparent time notations, in fractions of minutes, required for the execution of the associated ''element'' appearing on the data sheet.

It was not until June 29 1988, more than 5 months after Respondent had delivered the 31-page document to the Union, that the Union contacted its divisional headquarters, advising that it did not know how to use the materials presented by Respondent. I conclude from Daily's account of his conversation with President Rudd (in which Rudd stated that he needed help in deciphering the materials already served by Respondent) that, as a matter of law, it is futile for General Counsel to argue that if Respondent had earlier discovered the additional master data sheets (as it did on August 29, 1988) the bargaining would have been stimulated and advanced. Rudd did not know how to use the material at hand and himself had delayed 5 months before seeking aid, ultimately from Daily, in deciphering what the Respondent, at the Union's request, had served 5 months previously. I therefore conclude that Respondent may not be faulted, under Section 8(a)(5) of the statute, for having failed to provide the Union with materials other than that which it provided on January 15. Absent a showing that Respondent had the master data sheets in its possession and was hiding them, or that its failure to locate them, between January 15 and August 29, 1988, amounted to some grossly negligent conduct akin to a willful disregard of its bargaining obligation, I cannot fault Respondent's failure to provide such other material to the Union until August 29, 1988.

The record is obscure with regard to Respondent's claim that it was confused by the Union's requesting ''Master Data Sheets'' and then asking for a ''Standard Data Element Book'' (Tr. 177). Respondent's suggestion that its confusion arose from a lack of accuracy of the Union's request, to the extent that Attorney Scruggs felt it necessary to reduce to writing exactly what the Union was looking for, is not entirely persuasive. However, this is merely a matter of suspicion.

In any event, it was not until the July 22, 1988 collective-bargaining session, that Daily picked up a blank form of standard data sheet and showed Scruggs exactly what the Union was looking for (Tr. 552). It is from July 22 that Respondent's August 29, 1988 delivery of the standard data forms must be measured in terms of its compliance with Section 8(a)(5)'s demand for good-faith bargaining.

In Respondent's September 6, 1988 letter (G.C. Exh. 3(N)), Scruggs admits to having erred on July 22 in informing the Union that it did not have a copy of the 1985 standard data sheets. There is no evidence, whether gleaned from Respondent's or General Counsel's witnesses, to show that Scruggs' claim of ''error'' was made in bad faith. Nor is there evidence that his testimony that Smith delivered the documents to him on the very day of the August 29 collective-bargaining session and that he delivered them to the Union promptly on that date is suspect. Of course, all the facts supporting Respondent's testimony are and were within Respondent's control. Nevertheless, there is no suggestion on

the record that between July 22 and August 29, or at any other time, Respondent knew, or should have known, that it had retained in its possession the standard data sheets which reflected the underlying time motion studies of 1985. In analyzing Respondent's alacrity in executing the demand for the master data sheets and time motion studies, whether measured from the original December 10, 1987 demand, or the Union's particularizing its demand on July 22, 1988, Respondent's conduct, of course, raises suspicion. The fact is, however, that Respondent did admit on July 22 that it acted erroneously but this was a matter of a 6-week delay in collective bargaining which had been going on for more than 8 months at that time. Even so, if Respondent's testimony is credited, it only discovered the existence of the master data sheets on the very same day that it provided them to the Union. I cannot say that there is any other evidence of record which demonstrates the Respondent was sitting on its hands all the time, certainly from July 22, and failed to speedily provide the Union with the documents.

In the absence of other evidence showing that either Respondent's failure to provide the requested materials or its delay in providing it, prior to its execution of the demand on August 29, 1988, were acts of bad faith, I am constrained to recommend to the Board that the allegation of a violation of Section 8(a)(5) and (1) of the Act, in these regards, be dismissed as unproven. I therefore recommend to the Board that paragraphs 19, 20, and 21 of the third consolidated complaint be dismissed.

6. Alleged violation of Section 8(a)(5) by plant Manager Carl Hussey; unlawful direct dealing with union employees

On a Friday in August 1988, there had been a layoff of some helpers and inspectors at the Arlington plant (Tr. 622). Before the end of that Friday, Plant Manager Carl Hussey told Sharon Smith, 2-year employee, one of the three cutters in the plant, that he wanted to talk to the cutters on the following Monday morning. After a plantwide Monday morning meeting of all employees whereas Hussey told 50 employees that the layoff had not been their fault, that they were doing a good job and that they should keep up the good work, he asked the three cutters to stay behind because he wanted to talk to them as a group. The three cutters, Sharon Smith, Ray Charles Horn, and Larry Thompson, remained behind in the breakroom Hussey first assigned particular cutting operations to the three employees (Tr. 624) and there told them that he knew that they deserved a raise but that he could not give us a raise ''right now,'' that ''his hands were tied but that in a little while he would be able to give us a raise.'' (Tr. 624.) He also said that he would be placing one of the cutters over the other cutters in the cutting department.

Smith admitted that she had never received a pay raise since the Hussey conversation and that no one had been put in charge over other cutters in the cutting department.

Ray Charles Horn recalled that Hussey first ''rearranged'' the operations of the cutting department and how the ''paper work was going to run'' (Tr. 1212), and then told the three assembled cutters that ''he knew we deserved more money, and that right now that the Union's got his hands tied . . . [and] after they do away with the Union, we will get more money and . . . out of us three, it will be one cutter over the paper work, make more money than the other two would'' (Tr. 1212).

Although Respondent cross-examined Horn, it failed to inquire concerning his conversation with Hussey. Larry Thompson did not testify at the hearing.

Hussey testified that he recalled several meetings with cutting department employees in the summer of 1988 (Tr. 1351), but in none of them was the subject of raises ever discussed. Nor did he ever tell cutting department employees at the Arlington plant that he desired to give them a pay raise (Tr. 1352), or that the Respondent would give them a pay raise as soon as it got rid of the Union (Tr. 1351). On two occasions, however, Hussey testified that with regard to the alleged conversations with employees concerning a pay raise, he did not make statements to employees, specifically the cutting employees concerning a pay raise. He said, ''not in a particular meeting, no'' (Tr. 1351). When asked whether he had made statements similar to those which appear in paragraph 22 of the third consolidated complaint (that Hussey coerced employees, ''by telling them that although they needed a wage increase, Respondent could not grant them a wage increase because of the Union, and further telling said employees that the Respondent would give them a wage increase in the near future''), he said ''not in a meeting with the cutting department.'' It was only when pressed with the question whether he made any similar statement to that which appears in the complaint, regardless of whether it was in a meeting with cutters or any other employees, that Hussey made his denial broader (Tr. 1353) and stated that he made no such statement.

Discussion and Conclusions

General Counsel asserts that employees Smith's and Horn's testimony should be credited and that Hussey's blanket denial should be discredited, particularly since current employees testifying in the face of Respondent's representative should be credited. Their testimony is against the employer's interest and contrary to their own interest. See *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978), where the Board noted that it has long recognized that the testimony of a witness still in the employ of an employer, whose testimony is in direct contradiction to Respondent's supervisors, is apt to be ''particularly reliable, inasmuch as the witness is testifying adversely to his or her pecuniary interest, a risk not lightly undertaken.

In addition, I noted a certain hesitancy in Hussey's willingness to specifically deny having any conversations with cutters concerning pay raises. I was dissatisfied with his repeated assertion that he did not make any such statement 'in a particular meeting.'' Assuming arguendo, that Hussey thought that his denial related only to a specific meeting since the testimony of General Counsel's witnesses related to specific meeting, I nevertheless, in my observation of Smith and Horn as witnesses, do not believe that they made up their testimony out of thin air. Consistent with the Board's rule concerning the testimony of current employees testifying adversely to their employer, and noting my observation of Hussey's apparent hesitancy. I credit General Counsel's witnesses.

Respondent defends on the ground that Smith admitted, on cross-examination, that none of the statements allegedly made by Hussey had come to pass—none of the cutters have

been put in charge and there was been no pay raise received. The execution of Plant Manager Hussey's statements to the employees is not in issue; it is the statement themselves. To argue from lack of execution that the statements had not been made, it seems to me is a difficult and unsupportable position.

Furthermore, Respondent argues that assuming, arguendo, that Hussey did make the statements attributed to him by Sharon Smith, the statement violates neither Section 8(a)(1) nor 8(a)(5) because the phrase ''hands are tied'' is a mere reference to Hussey's personal powers (he is not on the Respondent's negotiating committee) and that the balance of her testimony that ''in a little while he will be able to give a raise'' is ambiguous because Hussey could have been referring to the conclusions of negotiations which might result in a wage increase. Unfortunately, Respondent's assertion of ambiguity is based on a record which does not exist. Hussey did not say that at the conclusion of the negotiations Respondent would give them a raise; he couched the giving of a raise much more personally than that. As Respondent notes, *he* will be able to give the raise (R. Br. p. 25).

The seminal phrase within the testimony of General Counsel's witnesses is that of Horn: ''[He] went on to tell us . . . after they do away with the Union, we will get more money.'' Respondent's brief in no way alludes to Horne's testimony and thus fails to attack Horne's credibility because Smith's version omits any reference to the Union. Nevertheless, if Horn is credited, Hussey is making a promise of benefit conditioned on Respondent getting rid of the Union (a promise and position not wholly inconsistent with the spirit of President Langston's preelection statements to Arlington unit employees) and also constitutes direct dealing with employees conditioned on Respondent's ''getting rid of'' the Union. A promise of benefits to employees without taking into account the power and responsibility of their certified collective-bargaining representative, alone, would constitute unlawful ''direct dealing'' with employees, in violation of Section 8(a)(5) and (1) of the Act. When the promise of such a wage increase, itself violative as direct dealing, is joined to the condition that it would occur after Respondent ''got rid of'' the Union, it would seem that the direct dealing has an explicit unlawful motive. While unlawful motive is not a condition of a violation of Section 8(a)(5), *NLRB v. Laredo Coca Cola Bottling Co.*, 613 F.2d 1338 (5th Cir. 1980), cert. denied 105 LRRM 2658 (1980), when, as here, an unlawful condition is placed in juxtaposition with the promise of benefit, then fortiori the violation is made out.

Neither my observation of Horn nor comparison of his testimony with Smith's causes me to discredit his version. Hussey's testimony was unimpressive.

I conclude, therefore, that Respondent by its Plant Manager Carl Hussey, in or about August 1988, as alleged, violated Section 8(a)(5) and (1) of the Act by promising employees a pay raise when Respondent got rid of the Union.

7. Alleged violation of Section 8(a)(5); withdrawal of agreement on holidays

In calendar year 1987, the holidays enjoyed by Respondent's employees appeared in Respondent's Employee Handbook, a printed booklet, at page 16 thereof, entitled ''These Are Your Holidays'' (G.C. Exhs. 5(B) and 5(C)). There are eight printed, named holidays in Respondent's Employee Handbook (New Year's Day, Good Friday, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Day, and a floating holiday).

In a separate paragraph, Respondent attached four limiting conditions to eligibility for holiday pay: the employee must be employed for 90 calendar days; the employees must work the day before *and* the day after the holiday; if the employee does not work the day before *or* the day after, such failure will be excused for any one of five printed reasons: absence due to work related injury; absence excused with a doctor's certificate; a military obligation; bereavement; and jury duty. Other conditions and limitations on holidays appear in the printed booklet but are irrelevant in this statement of facts. Sometime in 1987, but apparently before Christmas 1987, Respondent granted a ninth holiday: Christmas Eve.

At the first collective-bargaining session on January 15, 1987, Respondent's chief bargainer and counsel, Scruggs, gave to the Union's bargainer, Leachman, a copy of the printed Employee Handbook. In his own handwriting, he added the words (on the copy he served on Leachman) ''Christmas Eve added 1987.'' He then initialed the addition which he had written in (Tr. 326; G.C. Exh. 5(C)). Leachman retained this handbook, so inscribed by Scruggs.

On February 1, 1988, the Union submitted a holiday proposal which, inter alia, requested 12 paid holidays and, with regard to excused absences on the day before or day after the holiday, suggested the additional excuse ''unless his absence is for other justifiable cause.'' (G.C. Exh. 5(A).)

On March 22, 1988, Respondent submitted its *proposal* on the holidays (G.C. Exh. 5(D), the proposal appearing only in its typewritten form without any handwritten changes (Tr. 37). This March 22 Respondent holiday proposal listed nine holidays, including Christmas Eve, and repeated the five excuses for employees who are otherwise qualified for holiday pay but fail to work the day before and the day after the holiday. Discussions of holidays at collective-bargaining sessions occurred on April 1 and 15, May 11, and July 5, 1988 (G.C. Exh. 5(D)). Apparently some time in the April or May collective-bargaining sessions, but in any event no later than the July collective-bargaining session, the parties reached agreement with regard to the addition of a further basis on which employee absence from work on the day before or the day after the holiday would be excused. Agreement was reached on adding the language ''unless otherwise excused by management'' as a further basis for excusing a failure to work on the day before and the day after (Tr. 333–334). That agreed-upon further excuse was written in as the new section ''f'' in section 3 of the printed handbook (G.C. Exhs. 5(B) and (C)), (Tr. 338–339).

At the July 5, 1988 collective-bargaining session, however, the Union withdrew its own holiday proposal (G.C. Exh. 5(A)) and told Respondent that the Union would accept the Respondent's Handbook language along with the changes already negotiated (Tr. 339; R. Br. p. 31). Scruggs then asked the Union to submit its written position to Respondent. The Union refused to do so (Tr. 339; 344). Although Scruggs testified that he was confused by the Union's refusal to submit its proposal in writing (Tr. 339), he nevertheless told the union negotiators that its proposal was ''okay'' (Tr. 339). He then inscribed the new excuse (par. 3(f)) in the printed handbook as a matter that had been previously agreed on (Tr. 339–340).

Scruggs, after saying ''okay,'' then placed the expression ''ok,'' with his initials and the date ''7/5/88,'' on the printed handbook next to the title ''These Are Your Holidays'' (G.C. Exh. 4(B)); (Tr. 339–340). He gave this document, with his initials, ''ok'' and the date to the Union (Leachman) for her signature. He said: ''Here, sign that'' (Tr. 332). She did so. He told her: ''we have an agreement'' (Tr. 332). At this point, the Union (Leachman) handed Respondent (Scruggs) the copy of Respondent's employee handbook which Scruggs had given to the Union on the previous January 15, the first day of collective bargaining. That copy of the handbook contained Scruggs' notations showing the addition of Christmas Eve as a holiday (G.C. Exh. 5(C)). On that document, Leachman had already written in, as Scruggs had written in on his copy of the printed employee handbook, the new paragraph ''3(f)'' relating to the further excuse for failing to work on the day before or the day after holidays: ''unless otherwise excused by management.''

Leachman handed to Scruggs the above copy of the employee handbook holiday provision (containing Scruggs' notation of the addition of Christmas Eve) and said to him ''sign mine'' (Tr. 332; 335). When Leachman gave Scruggs her copy of the employee handbook holiday section containing the addition of Christmas Eve as a holiday, and asked him to sign it, he told her, ''I won't agree to this'' (Tr. 336); but Leachman said: ''you've already agreed to it'' (Tr. 336). Scruggs immediately said: ''No, we have not had a meeting of the minds on the number of holidays and we don't have an agreement on this subject'' (Tr. 336). Scruggs told Leachman that Respondent's proposal which the parties had agreed on did not include Christmas Eve, and that was the agreement Respondent was willing to make (Tr. 337). He also stated that if Christmas Eve was going to remain on the holiday list, Respondent was not willing to give up certain restrictive language that it had proposed on March 22, 1988, in Respondent's own holiday proposal. He again told Leachman that there had been no ''meeting of the minds (Tr. 337).

With regard to Scruggs' statement that the parties had an agreement and his mental reservation that that agreement included restrictive language that Respondent had proposed on March 22, Scruggs testified that after the Union (Willie Rudd) told him that the Union would accept the handbook language ''plus the things we have already agreed on'' (Tr. 344) and Rudd refused to put the Union's proposal in writing, Scruggs, decided to not make a ''big issue out of that'' (Tr. 344). As Scruggs described it, he picked up the handbook and told the Union that if they would ''agree to the handbook language plus what we had agreed on . . . we agreed to 3(f) . . . so I wrote that in there, and in fact I think we agreed we would write that in there as 3(f) . . . [and I] signed off on it, handed it to Mrs. Leachman and she signed off on it, and everything's hunky-dory until she hands me hers with the additional holiday on it'' (Tr. 344). He admitted that he never told the Union that Respondent's agreement to the holiday proposal was based on Respondent's willingness to withdraw any restrictive language in Respondent's March 22, 1988 holiday offer (G.C. Exh. 5(D).

Discussion and Conclusions

Respondent takes the position that when Scruggs examined his copy of the Company's handbook (G.C. Exh. 5(B), he mistakenly thought that the Union would agree to the eight holidays printed in the handbook opposed to the nine holidays which, in fact, had been in existence since the prior Christmas Eve (R. Br. p. 32). It was this mistaken understanding that, according to Respondent, when the Union made a verbal proposal to accept the ''company handbook language, along with the changes we have already negotiated'' (Tr. 339; R. Br. p. 31), Respondent believed that the Union was willing to accept eight holidays (rather than the nine holidays which existed since Christmas of 1987). Respondent argues that based on its mistaken understanding of the Union's verbal proposal Scruggs initialed a copy of the handbook (G.C. Exh. 5(B)) and gave it to the Union (Leachman) for her initialing. Respondent takes the further position that Scruggs first realized that the Union did not intend to give up a holiday in exchange for Respondent's dropping the eligibility language in its original proposal when it was served with Leachman's handbook (G.C. Exh. 5(C) which contained the Scruggs' addition of the Christmas Eve holiday listed thereon. It was on that realization that Scruggs says he refused to sign the copy served on him by Leachman (R. Br. p. 32, Tr. 346–348).

In support of its position, Respondent notes that before a labor contract is created, there must be a ''meeting of the minds.'' Respondent further states that Scruggs did not try to trap Leachman and suggests that the parties return to the bargaining table on the holiday issue (R. Br. p. 32).

It is unnecessary to discuss the various positions taken in Scruggs' testimony with regard to a failure of agreement due to lack of ''meeting of the minds.'' None of Scruggs' mental reservations concerning any ''quid pro quo'' for Respondent's initialing its own employee handbook were ever communicated to the Union. When Scruggs initialed his own copy of Respondent's Employee Handbook holiday section, it contained the agreed on (further) excuse for holiday pay encompassed in paragraph 3(f) which agreement had been reached early as the April or May collective-bargaining sessions. When the Union offered to accept the Company's handbook holiday language, ''plus the things we have already agreed on'' (Tr. 344), this statement preceded the execution of Scruggs' signature on the document and is saying ''okay'' and ''we have an agreement.'' The language concerning limitation of holiday pay ''unless otherwise excused by management,'' had already appeared on the face of the document at the time that Scruggs had signed off on it. Regardless of any further ambiguity or reservation that Scruggs had in his mind, such reservations or limitations were never communicated to the Union rather, they remained solely part of Scruggs' mental operations. What he signed was a complete document in and of itself to which his initialing and his expressed statement that ''we have an agreement'' demonstrated no inclusion of any further statements or condition.

The only element which arguably created ambiguity and a lack of ''meeting of the minds,'' on this record (notwithstanding Scruggs' insistence, *at the hearing*, that he had mental reservations and had been confused by Union President Rudd's refusal to put the Union's position in writing) was the absence from Scrugg's own copy of the Christmas Eve holiday. Regardless of Rudd's refusal to place the Union's position in writing, and regardless of Scrugg's mental reservations, if any, Scruggs testified that he nevertheless executed and stated that there was an agreement based on his

handbook, it appeared in General Counsel Exhbit 5(b)—i.e., without Christmas Eve as a holiday.

When Leachman asked him to sign her copy of the handbook (given to her by Scruggs) containing Christmas Eve as a holiday (written by Scruggs), this factor spurred Scruggs' refusal to sign Leachman's copy (G.C. Exh. 5(c) and, according to Scruggs, caused him to state that there had been no agreement because there was ''no meeting of the minds.''

8. Meeting of the minds and the parole evidence rule; mental reservations and unspoken contemporaneous oral statements

Whatever Scruggs' mental reservations, and regardless of any contemporaneous oral statements (which, in fact, he did not make) at the time of execution of the agreement on holidays, the agreement itself is not ambiguous and Scruggs' mental reservations must be excluded in determining whether an agreement existed. There is ambiguity on the face of General Counsel's 5(b) or 5(c) with regard to the meaning of the agreement. Thus parole evidence, if any, contemporaneous with the execution of the agreement, certainly unspoken mental reservations, must be excluded under the parole evidence rule from determining whether an agreement was made and what the terms of the agreement were.

There remains the question (which Respondent believes to be dispositive) of the failure of Scruggs' copy to have listed thereon, among the holidays, Christmas Eve as the ninth holiday. In fact, the failure of Scruggs' copy to have this ninth holiday (Christmas Eve) listed thereon is a mere scrivener's error. There is no contention, and there cannot be, that at any relevant time, the Respondent's holidays consisted of anything other than nine holidays. The eighth holiday program of 1987, under Respondent's prior unilateral act, no longer existed. Not only is that the fact, but Respondent's own March 22, 1988 contract proposal on holidays listed nine holidays as the holidays *in existence.* That had been true for several months at least. Thus, when the Union offered to accept the ''Handbook holidays'' and Respondent agreed, Respondent thereby accepted the existing current state of handbook holidays which, on this record, all parties agreed consisted of nine holidays.

Respondent argues that it refused to sign the agreement, based on the failure of ''meeting of the minds,'' because it thought that Leachman, in executing Scruggs' copy of the handbook (G.C. Exh. 5(B)) was accepting a listing of only eight holidays; and that when Scruggs saw Leachman's copy (in which he had inscribed Christmas Eve as the ninth holiday) with nine holidays, there was some fatal ambiguity. In fact, however, I find that there was no ambiguity whatsoever. At no place, outside the Scruggs' incomplete and outdated handbook, was there ever any suggestion of the existence of an eighth holiday program. Thus, when the Union accepted the ''Handbook'' (and that is what the Union proffered and to which Respondent agreed), it was accepting only that which was factually and legally *in existence*: nine paid holidays.

It is unnecessary to decide whether Scruggs' later withdrawal from the agreement flowed from an adversary position; whether, despite his argument, in brief, he was, indeed, trying to ''trap'' the Union on the basis of an outdated and inaccurate handbook; or whether he genuinely believed that the Union was sacrificing the ninth holiday in order to gain agreement. Under no statement in the record, whether it be Scruggs' bargaining notes, the testimony, or any other document or testimony, does there appear any suggestion that there was any communication by any of the parties at any time prior to July 5, 1988, that the number of existing holidays was a subject of dispute, much less that there was any dispute that agreement could be had on the Union's sacrifice of a holiday. It is this total silence on the question of the number of holidays which is the fulcrum of my conclusion that the number of holidays was not an issue; that even if Respondent was not trying to ''trap'' the Union by a dissembling position with regard to how many holidays were involved in their agreement, there was nothing said with regard to the number of holidays (nor to any other restriction on the limitations imposed on employees for being paid on holidays) prior to the time that Respondent signed off on the holiday booklet and said that there was an agreement.

The fact that Scruggs' handbook did not list the Christmas Eve holiday is, in my judgment, wholly immaterial since the Union had accepted, and Respondent had agreed to, the holidays listed in Respondent's ''Handbook.'' The holidays listed in Respondent's Handbook were nine holidays. Respondent's attempted withdrawal from the agreement at the bargaining table, when it saw that the Union was basing its acceptance on the existing nine holidays (as Leachman said ''sign mine''), is arguably an attempted bad-faith entrapment of the Union, or, putting a milder face on the course of events, a ''cat and mouse game.''

While the statute, particularly Sections 8(a)(5) and 8(d), envisions and permits hard bargaining, *K-B Resources*, 294 NLRB 908 (1989), the Board, with court approval, frowns on ''cat and mouse'' games which demonstrate a mere pretense at negotiations. Negotiations without a spirit of cooperation and good faith lead to an inference of a party's lack of desire to actually reach agreement. *NLRB v. Holmes Tuttle Broadway*, 465 F.2d 717, 719 (9th Cir. 1972).

In short, I find that Respondent's refusal to abide by the holiday agreement of July 5, 1988, and its repudiation thereof, constitute an act of explicit bad-faith bargaining and a violation of Section 8(a)(5) and (1) of the Act as alleged in paragraph 24(b)(3) of the third consolidated complaint.[13]

9. Alleged violation of Section 8(a)(5); Respondent's refusal to offer the Union an insurance premium deduction option for the employees at the Arlington location

In paragraphs 24(b)(4) and (5) the General Counsel alleges:

> (4) From on or about July 1, 1988, to on or about August 31, 1988, Respondent offered employees at its non-unionized plant the option, under Federal Tax

[13] To the extent Respondent argues that its bargaining notes demonstrate a lack of meeting of the minds, I read its bargaining notes quite to the contrary. For in those notes (R. Exh. 26, p. 2), it appears that Scruggs placed his initials on the company handbook language and gave it to the Union for its initialing *after* Willie Rudd explained what the Union had agreed to within the meaning of ''any items we have already to in negotiations.'' Thus, contrary to Respondent's arguments that there was ambiguity and uncertainty as to what this language meant, Respondent's own notes demonstrate that the Union explained what the Union's acceptance of ''any item we have already agreed to in negotiations'' actually meant before Respondent executed the holiday agreement (G.C. Exh. 5(B)).

> Code, of having insurance premiums deducted from there weekly pay before federal withholding and Social Security Taxes are calculated.
>
> (5) Respondent engaged in the conduct described above in paragraph 22(b)(4) without proposing to the Union that the employees employed in the Unit be granted the same option as that described in paragraph 24(b)(4).[14]

Respondent's answer admits the allegations of the complaint.

According to the evidence, in the period July 1 to August 31, 1988, Respondent offered its employees at its nonunionized plants the option, under the Federal Tax Code, section 125(d), of having insurance premiums, paid under the Social Security FICA program, deducted from their weekly pay before the calculation of Federal income tax withholding (Tr. 309–310). The exercise of such an option would bind the employee, for an unspecified period on this record, to minimization of his payment of income taxes based on weekly wages. Another effect, however, of an exercise of this option to minimize deductions from weekly pay (and therefore increase the actual wages received) is to *decrease* the employee contribution into the FICA pool. Thus the employee's contribution, in terms of measuring FICA wages, would decrease and therefore the employee's social security contribution would be lower. In case of subsequent disability or retirement, the employee's insurance return would be diminished by his decreased FICA contributions which resulted in the earlier maximization of the take-home pay (Tr. 311–312).

Respondent's position, taken on issuance of complaint and at the hearing, is that it failed and refused to offer the option to unit employees at Arlington because Respondent wanted to ''minimize the number of changes proposed [at Arlington] in hopes that the fewer changes to negotiate would increase the possibility of obtaining an agreement from the Union'' (Tr. 313; G.C. Exh. 4(n)).

Scruggs testified that he regarded the grant of the option to the nonunionized employees as a benefit (Tr. 316–317).

A notice posted at Respondent's four nonunionized plants on or about December 30, 1988 (G.C. Exh. 4(N)), attachment ''B'') addressed to ''All Employees,'' inter alia, states:

> Keep in mind that those of you who signed up for the 125(d) provision will receive a tax break for the amount you pay in insurance premiums. If you have any questions concerning these changes please contact the Benefits Office.

Scruggs testified (Tr. 1365–1866) that though the section 125(d) notice, posted at all Respondent's plants, was addressed ''to all employees,'' he had never discussed the section 125(d) option with the Union and never notified the Union or the employees at Arlington that such an option existed (Tr. 1367–1868). In fact, the basic memorandum posted at all the plants concerned Respondent's insurance program. The reminder concerning the section 125(d) option appeared on the final paragraph. The only plant at which the reminder concerning the section 125(d) option was not included was the Arlington plant. The record discloses that the Union never demanded the benefit of the section 125(d) option at the bargaining table or during collective bargaining prior to the issuance of the third consolidated complaint.

Respondent President Langston testified (Tr. 523–525) that the section 125(d) option was granted to all employees other than the unionized employees at Arlington and that the exercise of the option was a ''direct benefit money-wise.'' He denied that the only reason that this option was not granted to the Arlington employees was that they were unionized (Tr. 524) but testified that he did not know the reason it was not offered to them (Tr. 524). He asserted that it was in the hands of Respondent's negotiating committee; that it knew of the provision; and that he gave no direction to the negotiating committee whether to give the Arlington employees that benefit. As I understood his further testimony, despite his insistence that the issue of granting the option was in the hands of his negotiators, he said that if there was no union, there would be no negotiations and if there were no negotiations ''I guess this wouldn't have been a question.'' (Tr. 525.) Thus, as I understand his testimony, if there had not been a union at the Arlington unit, the employees would have been granted the section 125(d) option.[15]

Discussion and Conclusions

As above noted, General Counsel alleges a violation of Section 8(a)(5) and (1) of the Act in paragraphs 24(b)(4) and (5) of the third consolidated complaint. Those subparagraphs alleged the violation because in the period July 2 through August 31, 1988, Respondent offered its nonunionized employees the section 125(d) Tax Code option without proposing to the Union that the unionized employees at Arlington be granted the same option.

The short answer to this allegation is the Respondent engaged in no fraud or deception. It simply did not offer the benefit at the unionized plant. The Union knew nothing of this benefit until the hearing.

Respondent, in collective bargaining, is under no obligation to acquaint the Union of working conditions and benefits at its other plants. It is under no obligation to offer anything. The Union may make demands or requests to improve or change wages, hours, and other terms and conditions of employment. The employer need offer nothing, even if the effect is to frustrate bargaining, *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 110 (1970) (Justices Douglas and Stewart, dissenting).

I recommend that this allegation be dismissed. Cf. *Chevron Oil Co. v. NLRB*, 442 F.2d 1067 (5th Cir. 1971), cited in *Soule Glass & Glazing Co*., supra.

[14] The conduct alleged in all of par. 24(b) is alleged as a violation of Sec. 8(a)(1) and (5) and Sec. 8(d) of the Act.

[15] Although the facts suggest that Respondent withheld granting the option to the unionized employees at Arlington because of their unionized status, on the testimony of President Langston, I make no analysis or finding with regard to the violation of Sec. 8(a)(3) of the Act. There was no such allegation, and the case was litigated on the theory that withholding of the option impeded bargaining such as to constitute a violation of Sec. 8(a)(5) of the Act. On due process grounds, therefore, I will disregard any suggestion of discriminatory motive in the failure to grant the option to the unionized employees or that, in any case, there was a violation of Sec. 8(a)(1) or (3) of the Act. See *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055 (1st Cir. 1981); *Advo System*, 297 NLRB 926 (1990).

10. Alleged violation of Section 8(a)(5); bad-faith bargaining with regard to the issue of dues checkoff

In paragraph 24(b)(7), General Counsel alleges that Respondent took arbitrary and shifting positions with respect to the issue of dues checkoff and, thereby, frustrated bargaining and manifested an intent not to reach final and binding agreement.

The facts do not appear to be in substantial dispute. On January 15, 1988, at the first collective-bargaining session, the Union submitted its dues-checkoff proposal requiring Respondent to deduct employees' union dues and initiation fees from wages and to remit such amounts to the Union (G.C. Exh. 6(A); Tr. 373). At the ensuing February 11 collective-bargaining session, Scruggs told the Union that Respondent had not decided whether it would agree to a checkoff at all but, in any case, it would not agree to this dues-checkoff demand. In particular, Scruggs told the Union that it was his understanding that employees, under the law, could resign from union membership at any time; but that the Union's existing dues-checkoff demand made the dues-deduction authorization irrevocable for a year and that, thereafter, the requested checkoff provision would give each employee only a 10-day ''window'' once a year to withdraw the checkoff authorization (Tr. 374).

On June 21, 1988, the Union changed its position with regard to checkoff. At a collective-bargaining session on that date, in the presence of a union attorney, the Union offered to insert the words ''equivalent of'' before the expression ''regular dues.'' Respondent made no further statement except that it would consider the amended request on dues checkoff. Ultimately according to Scruggs, it could see no difference from the original offer regarding the obligation to deduct money for a year and the limited escape clause (Tr. 375–376).

On August 29, 1988, Respondent told the Union that it wanted no checkoff clause in the contract (Tr. 378; 379) and made no counterproposal regarding checkoff (Tr. 379). When Leachman asked for Respondent's position on checkoff, and Scruggs told her that Respondent wanted no checkoff provision in the contract, Leachman told him: ''Well, you're not getting your management's right clause . . . and we have no other checkoff clause to present.'' (Tr. 380.) Scruggs responded that although they did not want a checkoff clause in the contract, Respondent would consider alternatives to checkoff (Tr. 383).

It is undisputed that on July 22 Respondent presented its final'' contract proposal which, on August 29, 1988, the Union rejected. In its letter of September 6, Respondent declared that the parties were at impasse. Following the filing of an unfair labor practice charge on November 10, the parties resumed bargaining on November 16 with Respondent striking the word ''final'' from its July 22 final offer.

On November 16, 1988, the Union told Respondent that it would be willing to consider an alternative to checkoff and asked Scruggs to submit a counterproposal. Scruggs stated that as an alternative to checkoff Respondent would permit the Union to use the cafeteria on one payday per month to collect dues. At the Union's request, Scruggs agreed to put this counteroffer in writing (R. Exh. 33).

On December 5, 1988, Respondent submitted this dues collection counterproposal. It provided (and the parties discussed it) that union representatives would be permitted to visit the plant to collect union dues, assessments, initiation fees, and voluntary contributions from employees on the last Monday of each month, between 2:15 an 4:15 p.m. with Respondent providing the Union with a table and chairs in the entranceway to the plant production area. Respondent further conditioned the visits by union representatives so that the visits would not interfere with the conduct of Respondent's business or the work of any employees; and employee payments to the Union would made during the employees' regularly scheduled break period or after work. (G.C. Exh. 6(C).) The parties discussed the Union's proposal's restrictions on employee ''escape'' from the checkoff obligation and the Union questioned Scruggs regarding Respondent's policy and practice on its deductions from employee pay already in existence. (R. Exh. 33.) In substance, the Union requested that the parties agree to the maintenance of Respondent's handbook provision on deductions from employee's pay.[16] Scruggs then asked if the Union's provision was supplementary to the Union checkoff proposal or in place of it. The Union responded that its proposal on checkoff was not withdrawn. Respondent then rejected the Union's proposals concerning the Union's checkoff proposal and the further handbook terms proposal (R. Exh. 34).

On December 20, 1988, Respondent answered the Union's questions concerning Respondent's position on checkoff (G.C. Exh. 6(D). The Union had previously noted that Respondent subtracted from employee paychecks contributions to Respondent's credit union and for medical insurance purposes. Respondent stated:

> The programs you cited in your letter (i.e. credit union, medical insurance) are company-sponsored benefits program. We do not consider deduction of union dues a company-sponsored benefit program. We are opposed to any sort of wage assignments—we don't take them from creditors, even if the employee were to authorize it. Ours is not a high-wage industry and we want the employees to realize as much take home pay as they can. What they do with it after they receive it is their business. Too many deductions from an employee's paycheck might tend to generate dissatisfaction with the Company pay rates. Another reason for the Company's declining to agree to deduct union dues is that the checkoff authorizations are too restrictive. Furniture Workers Union cards I have seen automatically renew themselves from year-to-year and an employee who wishes to revoke his or her checkoff has only a small ''time window'' each year in which to serve written notice of the revocation. . . . We don't want to play any part in employees getting trapped into something they have difficulty getting out of. The Company proposal of union on-premises dues collection offers employees the right to cease paying dues each month. We stand ready to discuss this subject at any alternative proposals the Union may have to submit.

[16] Respondent's handbook maintains a separate section reciting the requirements of ''payroll deductions'' (G.C. Exh. 2(E), p. 14). That provision notes the obligatory nature of deductions from the paycheck of both income taxes and social security contributions. It then states: ''Any other deductions must be authorized your written signature before they can be made.''

At the 29th collective-bargaining session on February 9, 1989, the checkoff issue was again discussed. The Union (Leachman) asked Scruggs if Respondent's only concern with the Union's dues-checkoff proposal was the ''narrow window to revoke it'' (R. Exh. 36). Scruggs said that he had given the Respondent's position on checkoff several times; that the position was unchanged, that the law gives the employees the right to resign from the Union at any time, and therefore Respondent objected that the Union's dues authorization was not revocable at will. Scruggs', however, said that Respondent had other objections to the Union's checkoff clause as well. In particular, as he had stated in his December 20 letter to the Union (G.C. Exh. (D)), that: ''A checkoff would generate a perception among the employees that their take-home pay is too low.''

When Leachman asked Scruggs whether a union agreement to ''an open-end checkoff would ease [Respondent's] concern,'' Scruggs answered that such a concession ''would possibly address one of our concerns.'' Scruggs added that while Respondent would receive and consider any union proposal on checkoff ''that would not address our net pay concern.''

When Leachman then suggested that Respondent give the employees a pay raise (to meet the ''net pay'' reservation), the employees on the bargaining committee then addressed certain personally abusive remarks to Scruggs (G.C. Exh. 36), and the discussion of checkoff apparently ended, not to be resumed.

Although not specifically noted in the handbook, Respondent in addition to obligatory deductions for income tax and social security—as well as court-ordered deductions (support payments, garnishment, etc.) authorizes deductions based on employee requests where the deductions from paychecks go to pay health insurance or deposits in Respondent's credit union (Tr. 425–426).

Leachman, at the hearing asked Scruggs if he had made the statement that the reason Respondent would deduct credit union moneys and not dues checkoff was because the credit union benefited the Company. Scruggs testified that Leachman had got the words ''backwards''; that he had said that the credit union was a company benefit, a company-sponsored benefit, such as insurance and ''that sort of thing.'' He said that it was ''a benefit that [Respondent] made available to the employees'' (Tr. 426).

Discussion and Conclusions

Scruggs' testimony and the documentary evidence demonstrate that Respondent's objections to the checkoff consisted of two elements: (1) the Union's checkoff proposal froze employees into a checkoff for a period of a year with a 10-day ''window'' escape which, Respondent concluded, was too complicated and narrow for the employees to understand. Thus they would be obligated for a least a year into checkoff deductions when the law, as Respondent understood it, permitted both resignation from the Union and escape from the checkoff clause at any time. (2) Respondent permits deductions from the employees' wages only under legal obligation such as income tax, social security, court orders, etc. Respondent rationalizes deductions from employee pay based on contributions to Respondent's credit union and health insurance plan on the ground that these were Respondent-sponsored benefits to employees. Respondent apparently believes that the voluntary checkoff of union dues does not constitute a benefit to employees. In order to maximize the face amount of wages paid to employees, as Scruggs testified, Respondent was anxious not to have further deductions from their pay.

When the Union, however, at the February 9, 1989 collective-bargaining session asked Scruggs whether Respondent would agree to a checkoff provision containing an ''open end'' checkoff (i.e., a checkoff provision permitting the employee to discontinue checkoff of contributions at any time), Scruggs answered that such a concession ''would possibly address one of our concerns . . . [but it] would not address our net pay concern.'' Based on this exchange between Leachman and Scruggs, I conclude that Respondent's ultimate position in rejecting the Union's checkoff proposal was that the checkoff would diminish in the eyes of Respondent's employees the size of already comparatively small net pay. When, at this same February bargaining session, Scruggs raised the question of the ''net pay concern,'' he was met by Leachman suggesting a pay raise and decision and abuse from her cobargainers.

A ''philosophical'' opposition to checkoff, a union-security device, may constitute evidence of bad-faith bargaining, *Tiffany & Co.*, 268 NLRB 647 (1984). No such Respondent opposition was manifested here.

The evidence shows that in the February 9, 1989 collective-bargaining session, when Leachman tentatively proposed an ''open end'' checkoff (revocation of checkoff at any time), Scruggs relied only on Respondent's ''net pay'' concern, i.e., diminution of the face of the paycheck.

Where a proposed dues-checkoff clause is rejected as being ''nothing more than a union security device and because it made employees' earnings appear lower,'' it has been held that such a rejection was ''not based on any legitimate business reason and does not satisfy the statutory obligation to bargain in good faith.'' See *NLRB v. J. P. Stevens & Co.*, 538 F.2d 1151, 1165 (5th Cir. 1976); and *NLRB v. A-1 Kingsize Sandwiches*, 732 F.2d 872 (11th Cir. 1984).

In the instant case, while Scruggs did not explicitly disparage Leachman's tentative offer as a ''Union security device,'' he did reject it because it was not a company-sponsored benefit and because it was not revocable at will, i.e., too much union security. When Leachman's tentative offer sought to eliminate this wing of Scruggs' objection, the ''net pay'' objection became paramount.

I conclude that Scruggs' statements, particularly his insistence that Respondent-sponsored deductions were acceptable impositions on employees' net pay, demonstrate, if not a ''philosophical'' opposition to checkoff, *Tiffany & Co.*, supra, yet an opposition because it benefits the Union rather than Respondent. On such an inference, Respondent's position comes substantially within the bad-faith rule in *NLRB v. J. P. Stevens & Co.*, supra; *NLRB v. A-1 Kingsize Sandwiches*, supra. An opposition to checkoff because it is only a ''union security device and because it made employees' earnings appear lower'' is not based on a legitimate reason and does not satisfy the statutory obligation to bargain in good faith. I conclude that Respondent's rejection of checkoff, on the grounds specified, violated Section 8(a)(5) and (1) of the Act.

I was not impressed with Respondent's argument that it steadfastly opposed other employee paycheck deductions (R. Br. p. 36) especially that it ''refused requests for payroll deduction of United Way and various optional employee-elected insurance coverages.'' The only authority for such a statement which Respondent cites is the testimony of President Langston (Tr. 519–520): that Respondent would not permit any ''extraneous insurance through payroll deduction because anything that reduces what the employee sees as his take-home pay constitutes, in Respondent's judgment, a ''negative'' (Tr. 520). In short, he testified that he has resisted ''other deductions'' over the years (Tr. 520) which do not constitute what he regards as ''direct benefits'' to the employees such as hospitalization insurance and credit union deduction (Tr. 521).

Employee Josephine Benson testified, however, regarding a 1986 meeting in Respondent's breakroom at which Plant Manager Bill White was present (Tr. 920–921). A United Way representative circulated papers wherein each employee donated a dollar and was given a United Way pen and a sticker. In addition, however, the United Way representative told the employees that if they wanted to donate to the United Way they would take it out of ''your check'' (Tr. 921). No one from management contradicted this (Tr. 922) but no employee signed any of the papers authorizing deductions. Benson was confident that Plant Manager White was present when these transactions occurred. He instructed the employees to return to work after the United Way presentation (Tr. 942). White testified that he recalled no such incident, but said it could have happened (Tr. 1443).

The point, of course, is that White did not tell the United Way representative or the employees of the existence of any Respondent policy against deductions from their pay. On the other hand, White may not have known of the policy, if it existed, and Respondent cannot be held accountable for a policy with which even the plant manager is not familiar, notwithstanding that it was longstanding. I find this position difficult to credit.

Lastly, I do not believe that Respondent's counteroffer, permitting the Union to collect dues at the plant during break periods or at day's end, in the plant or in the parking lot, ''cures'' its bad-faith rejection of the Union's checkoff request. Whatever the merits of the counteroffer, Leachman was clear in telling Scruggs that the Union's checkoff request was not withdrawn. Since the Union's proposal was rejected on unlawful grounds, the Union's continued bargaining (rejecting Respondent's counteroffer) cannot be construed as a withdrawal of its offer or a waiver. The unremedied violation was outstanding with or without Respondent proposing an alternative checkoff, whatever its merit.

11. Respondent's contract proposals and unilateral implementation of its proposed insurance plan as violations of Section 8(a)(1) and (5) of the Act

Except for a single issue of credibility, explicitly isolated below, there appears to be no substantial dispute on the facts of the parties' bargaining on insurance and Respondent's unilateral implementation of its insurance proposal.

At all material times prior to the December 1987, certification of the unit, Respondent's employees were covered by a group medical insurance plan underwritten wholly by Respondent and administered by Provident Life and Accident Insurance Company.

No later than February 4 1988, the Provident Life and Accident Insurance Company notified Respondent (R. Exh. 37) that in order to maintain the existing health and other insurance coverage, a premium increase of approximately 20 percent would be required from Respondent to support a financially sound insurance plan. The insurance premiums paid by Respondent are funded apparently in large part from payroll deductions from employees' wages. Respondent did not implement the recommendation of its insurance administrator to increase premiums by 20 percent because Respondent believed that such an increase would have an excessive impact on employee wages (Tr. 1939).

In collective bargaining of March 22, 1988, Respondent submitted an insurance proposal (G.C. Exh. 4(E). Respondent would continue to make available to employees the existing ''group insurance coverages'' with Respondent paying the same dollar amount for the cost of the insurance. The ''group insurance coverages'' were defined as life insurance, accidental death and dismemberment insurance, and basic and major medical insurance. In addition, the company defined employee eligibility for the insurance program and proposed that Respondent would have the right to change the identity of the insurance carrier and, if necessary to effectuate such change, alter the details of policy coverages and claims procedures. It appears, however, that Respondent's March 22 offer was withdrawn on April 26, 1988, pending a study by Respondent of insurance problems posed by its administrator's suggestion of increased premiums. (See G.C. Exh. 4(E).)

On June 21, Respondent discussed a further insurance proposal (apparently given to the Union immediately after June 2, 1988) in collective bargaining (G.C. Exh. 4(E) and (F): the types of insurance and other elements of the existing plan would remain except that the individual and family premium costs to employees would be increased and the deductibles would be increased. Coinsurance would be changed from 80 percent under the old plan to 75 percent under the new plan (after the deductible).[17]

The Union, already in possession of Respondent's existing insurance program, and with Respondent's letter of June 2, 1988, in hand, wherein Respondent proposed the above changes, had compared Respondent's proposed plan with the plan of the United Furniture Workers Insurance Fund (G.C. Exh. 4(H)). According to the assistant director of the Union's insurance fund, the share of employee premiums under the union plan would be less and he also notified the Charging Party that the United Furniture Workers Insurance Fund was prepared to guarantee to Respondent a 3-year contribution rate with ''better benefits for a lesser overall cost'' (G.C. Exh. 4(H)).

At the June 21, 1988 bargaining session, when the findings and conclusions of the United Furniture Workers Insurance Fund were given to Respondent verbally, Respondent asked for the Union's position with respect to Respondent's insurance proposal in view of its desire for an interim agree-

[17] On June 14, 1988, Respondent had proposed to implement changes in the group insurance effective July 1, 1988, and told the Union that, in future negotiations, it would like to make the insurance problem ''top priority for our forthcoming sessions;'' but added, ''obviously, exactly what is implemented, and when, is the subject for negotiations.'' (G.C. Exh. 4(g).)

ment on an insurance plan (Tr. 272). The Union said that it did not want to ''piecemeal a contract'' (Tr. 272) and said that it would not agree to the plan proposed by Respondent (Tr. 270). Scruggs testified that he wanted to advance the issue of Respondent's insurance proposal on the collective-bargaining agenda because of a ''sense of urgency due to the underfunding'' (Tr. 273). He thus told Leachman that he wanted to implement the insurance plan effective July 1, 1988, although he was still willing to continue to discuss the insurance matter (Tr. 273). Although Scruggs told Leachman that the increases in insurance deductions had been recommended by the insurance company (Tr. 273), he submitted no documents to the Union. The only basis for his testimony with regard to the ''sense of urgency'' for the July implementation was, as he testified, his telling Leachman of the recommendation by the insurance company. He may have used the word ''urgent'' (Tr. 275) in speaking to Leachman about this matter.

As above noted elsewhere on July 22, 1988, Respondent submitted its ''final offer'' to the Union. This comprehensive offer was the ''final contract proposal submitted by Langston Company'' (G.C. Exh. 3(H)).[18] This July 22 ''final offer'' had the same insurance materials as that offered on June 2 and discussed on June 21.

On August 31, 1988, the Union rejected Respondent's final offer of July 22 (G.C. Exh. 3(M)); and on September 6, 1988, Respondent declared impasse (G.C. Exh. 3 (N)).

Respondent concedes that the parties commenced further collective-bargaining negotiations on November 16 (Tr. 245) after the Regional Office of the Board issued a complaint in which it alleged, inter alia, that the parties were not at impasse (Tr. 236). Respondent asserts that while it did not agree with the determination that there was no impasse, it nevertheless struck from its ''Final Offer'' the word ''Final'' and notified the Union of its desires to reconvene collective bargaining (Tr. 237). Respondent, having struck the word ''Final'' from the offer, made no other changes in the ''Final Offer'' of July 22 (Tr. 238), but told the Union that it would consider counterproposals from the Union (Tr. 239).

The record, with regard to bargaining on insurance is silent until December 20, 1988. On that date, Respondent wrote to the Union (G.C. Exh. 4(J)) and confirmed the existence of a collective-bargaining session on the next day (December 21). In addition, it specified a desire to have the discussion center on medical insurance. The letter stated that Respondent's proposed changes were based on ''generally escalating cost of health care,'' incorporated in the ''final proposal'' of July 22, 1988.

In particular, Respondent notified the Union that it desired to implement the coverage changes effective January 1, 1989. To secure union agreement on the proposed changes, Respondent offered to increase the amount of the Respondent's contribution (from $50.35 to $57.33/monthly/family coverage; from $36.60 to $39.53/monthly/individual coverage). Respondent agreed not to increase the employee contribution except as a result of increased costs and offered to guarantee 30 days' advanced notice of any such increase (G.C. Exh. 4(J)).

As General Counsel notes, Respondent's insurance offer, as it had since July 22, contained the following language:

> The Company shall have the right to change the identity of the insurance carrier and, if necessary to effectuate such change, alter the details of policy coverage and claims procedures. (G.C. Exh. 4(E)).[19]

At the December 21 collective-bargaining session, Scruggs said that although everything was open for discussion he wanted to discuss insurance (and the Union's job standards proposal).

The parties are in particular dispute whether Leachman insisted on the Union's insurance proposal (coverage under the Furniture Workers Insurance Plan) if the employees ''paid one penny'' of the insurance premium; or, whether she said only that the employees would have ''voice'' in deciding the identity of the carrier if they paid ''one penny''; and that she said that the carrier ''did not have to be the Furniture Workers Insurance.'' On my observation of the witnesses, I believe that credibility lies on the side of Respondent. I draw this conclusion based not only on my observation of Leachman and Scruggs but on the tenor of the insurance negotiations as they proceeded up to this point. Needless to add, the parties reached no agreement on the insurance proposals.

Nevertheless, at the conclusion of the meeting, Respondent proposed a further meeting on December 29 and the Union agreed to telephone Respondent the following day to check on availability. When Respondent did not hear from the Union through December 28, it contacted the Union. Leachman told Scruggs that she would call back but she failed to do so. He offered to meet the next day and delivered this request by courier (G.C. Exh. 4(K)). In this letter, however, Respondent declined to agree with the Union's position (Union would not agree to Respondent's proposed changes unless Respondent was willing to pay the entire insurance coverage cost) and, noting that the Union had had 6 months to study Respondent's proposed coverage changes, stated that Respondent would implement the December 20 insurance and premium changes, effective January 1, 1989, if the Union did not meet with the Company on December 29 to discuss insurance and other contract matters (G.C. Exh. 4(K)).

On December 30, 1988, in a letter to the Union, Respondent stated that it had heard nothing from the Union following

[18] This final proposal notes on its face that the parties, in the period January 22, 1988 through July 12, 1988, had reached agreement on 10 items (recognition, company-union relations, call in pay, overtime, payday, jury service, first aid cabinet, savings provision, sick pay, and bereavement pay). The document, however, also notes 25 items of economic and noneconomic issues on which no agreement had been reached (management rights, no-strike no-lockout, stewards, union visitation, grievance and arbitration, seniority, job vacancies, layoff and recall, hours of work, meal and rest periods, wages, vacations, holidays, insurance, pension and retirement, leaves of absence, discipline and discharge/plant rules, substance abuse, plant safety and security, physical examinations, temporary job assignments, job classification and duties, special categories of employees, complete agreement and duration and termination of agreement). With regard to wages, for instance, Respondent's original position was merely to notify the Union of its existing wage pattern (G.C. Exh. 3(a)). In the face of the Union's proposal of substantial wage increases made February 1, 1988, Respondent's counterproposal of March 22, 1988 (G.C. Exh. 3(C)), was the subject of discussions apparently in June 1988. By July 5, 1988, the Union had modified its wage demands in the first and second year, dropping them from a $1-per-hour increase to 80 cents. No agreement on wages, however, was reached.

[19] Respondent (Langston and Scruggs) testified that Respondent believed that its desire to have ''leverage'' on the insurer was a particular reason not only to control the identity of the insurer, but to reject the Furniture Worker's Insurance Plan as the insurer.

their December 27 telephone conversation and nothing following the December 28 letter. Respondent then advised the Union that it was implementing the insurance proposals on January 1, 1989 (G.C. Exh. 4(L)). The insurance proposals were then implemented.

Respondent notes (R. Br. p. 27) that a notice of the changes of insurance coverage and deductions were posted on the Arlington Plant bulletin board and that the changes made in the Arlington unit with regard to insurance were implemented at the Company's nonunion facilities (Tr. 1936–1937; R. Br. p. 27).

On January 4, 1989, the Union, acknowledging receipt of Respondent's January 30 letter, notified Respondent (G.C. Exh. 4)) that it did not agree with Respondent's ''attempt to force these changes down the workers' throats.''

Discussion and Conclusions

By paragraphs 23(a) and (b) General Counsel alleges that the Respondent's December 30, 1988 implementation was unlawful because it was performed unilaterally without having reached a valid impasse in its negotiations and because it implemented in bad faith. In addition, by virtue of paragraph 24(b)(6) General Counsel also alleges that Respondent's insistence in the insurance plan on the reservation of the right, during the term of the collective-bargaining agreement, to ''change the identity of the insurance carrier and, if necessary effectuate such change, alter the details of policy coverage and claims procedures'' manifested a refusal to bargain in good faith in violation of Sections 8(a)(1) and (5) and 8(d) of the Act, and, together with other violations, were sufficient to set aside the settlement agreement in Case 26–CA–12392 (par. 28, third consolidated complaint). I agree.

As preliminary matter, it is noted that the General Counsel does not allege that Respondent's course of bargaining on its insurance proposal and the Union's insurance proposal constitutes bad-faith bargaining. That issue therefore need not be addressed. Rather the General Counsel cites only the *implementation* of December 30 (effective January 1, 1989) and the *reservation* of the right to change identity of the carrier and *alter the details* of policy coverage and claims procedures as violations.

The parties dispute the existence of good-faith impasse on September 6. Respondent acknowledges that the Regional Directors issuance of complaint in October 1988 was the basis for its decision to resume collective bargaining with the Union on subjects, inter alia, including the parties' respective insurance proposals (Tr. 236).

It is axiomatic that any existing impasse as of the November 16, 1988 resumption of full-scale collective bargaining on all subjects necessarily broke the preceding impasse, if any. *Southwestern Portland Cement Co.*, 289 NLRB 1264 (1988).

It is also well settled that an employer violates the duty to bargain collectively when it institutes changes in employment conditions without first consulting the Union. It may also be true that under some conditions, the employer's power to alter working conditions in its plant is *not* contingent on union agreement with the proposed change; but only on the employer's obligation to notify the Union before affecting the change so as to give the Union a meaningful chance to offer counterproposals and counterarguments. *NLRB v. W. R. Grace & Co.*, 571 F.2d 279, 282 (5th Cir. 1978), as cited in *Soule Glass Co.*, supra. On the other hand, as noted in *Soule Glass*, ordinarily, in order for the unilateral act to not violate Section 8(a)(5), the employer would have bargained in good faith to impasse on the issue citing *NLRB v. U.S. Sonics Corp.*, 312 F.2d 610, 615 (1st Cir. 1963).

(a) There is little doubt that the Union had a full opportunity to bargain on Respondent's insurance proposal. By December 30, 1988, it had been on the table and bargained over since at least June 1988. The Union, in short, wanted its insurance proposal; Respondent wanted its proposal. Respondent's December 1988 actions invited continued bargaining on insurance. The Union did not answer Respondent's invitation. The Union would not surrender on its demand that the Furniture Workers Insurance Plan be adopted if the employees paid ''one penny.'' Respondent wanted control in order to have ''leverage'' over the insurer in the payment of claims. This is ''impasse.'' Whether it is a ''good faith'' impasse is another matter.

I, resolve the December 30, 1988 impasse issue because I conclude that Respondent's insurance proposals on which it went to December 30 ''impasse'' and which it implemented as of January 1, 1989, were either unlawful, manifested bad-faith bargaining, the implementation of which further violated Section 8(a)(1) and (5) of the Act;[20] or were nonmandatory subjects of bargaining which could not be lawfully pressed to impasse.

Respondent's insurance proposal since at least July 22, 1988, and continually thereafter, reserved to Respondent the right unilaterally to change the identity of the insurance carrier, the details of policy coverage and claim procedure. Health insurance for employees, though funded in part by employee contributions, is a mandatory subject of bargaining, see, e.g., *Coalite, Inc.*, 278 NLRB 293, 301 (1986). Reservation of unilateral control over a mandatory subject of bargaining to otherwise good-faith impasse is not, per se, a violation of the 8(d) bargaining obligation. I conclude, however, that where, as here, the contract proposal which goes to impasse includes unilateral control over *future changes* of substance in the reserved matter, such a proposal, itself, pressed to impasse, is unlawful or, at least, not a mandatory subject of bargaining. Compare *Colorado Electric Assn.*, 295 NLRB 607 (1989), with *Marina Hotel & Casino*, 296 NLRB 1116 fn. 1 (1989). Respondent's proposed reservation of unilateral power over future changes in insurance coverage identity of the insurer and the claims procedures constitutes such unlawful bargaining because the proposal, pressed to December 30 impasse, would ignore the certified, statutory representative's right to be notified and consulted before changes are made in existing terms and conditions of employment. Absent the Union's consent or waiver, the Union has that statutory right. Thus, while Respondent may bargain to impasse on an insurance proposal without such reservations or while the Union may consent to or waive its right to consultation on future, unilateral changes embodied in a contract proposal containing such reservations, Respondent may not usurp, ab initio, the Union's statutory right to consultation and bargaining on *future changes* under cover of bargaining to impasse. To do so, as General Counsel alleges, violates Section 8(a)(1) and

[20] It is unnecessary to determine the existence of a bargaining impasse in the presence of actions constituting contemporaneous bad-faith bargaining. *Richmond Recording Corp. v. NLRB*, 836 F.2d 289 (7th Cir. 1987); *NLRB v. Huck Mfg. Co.*, 693 F.2d 1176 (5th Cir. (1982).

(5) of the Act. This occurs either because Respondent pressed this nonmandatory proposal to impasse or because it manifested subjective, bad-faith bargaining.

Similarly, to implement such a proposal, as General Counsel alleges, without the Union's consent, further violates Section 8(a)(1) and (5) of the Act. See *Colorado-Ute Electric Assn.*, 295 NLRB 607 (1989). Impasse (if any) is no defense since the legal requirement for lawful implementation of such a proposal is the Union's consent or waiver, not alleged good-faith impasse.[21]

12. Alleged violation of Section 8(a)(3); the discipline of Josephine Benson

As above noted, half-bag production at the Arlington plant ceased at the end of 1987. The four sewers of half-bags prior to cessation of production were Josephine Harwell, Shirley Teamer, Josephine Benson, and Stewart (Tr. 1361).

Prior to the November 23 election, Benson distributed authorization cards to coemployees at Arlington and began wearing a union button to work. She also wore a union T-shirt and a union cap to work on the day of the election. Commencing January 1988, she served, almost without interruption, on the Union's contract negotiating committee missing only a few of the 30 bargaining sessions.

Immediately before the election, she was present when Respondent's president, Robert Langston, asked Justine Harwell: ''What are you doing back here with these troublemakers''? (Tr. 789–836).[22]

It is therefore clear that Respondent knew or believed that employees Nabors, Teamers, Benson, Payne, and Harwell were union ''troublemakers'' and that the half-bag department, in particular, was a center of unionism. Langston knew this because all these employees wore union buttons openly (G.C. Br. p. 4; Tr. 647, 706, 834, 1126).

With the end of half-bag production at Arlington, in December 1987, Benson successfully ''bumped'' and became a sewing machine operator in the bulk bag department. She was in a production-rated job and was required to maintain daily production reports of her production operations.

On November 15, 1988, Vice President Smith called Benson into his office and told her she was receiving a warning for inaccurate reporting of production time. In particular, Smith referred to Benson's production reports of November 2 and 4, 1988 (G.C. Exhs. 12(a) and (b)). Benson testified that, during the meeting with Vice President Smith, he told her that the company had previously warned her and employees Harwell, Stewart, and Teamer concerning improper reporting. (Tr. 862.) Benson denied that any company official had warned her concerning production reporting prior to this November 15 meeting.

Vice President Smith ceased being employed by Respondent in January 1989, and did not testify at the instant proceedings. However, Supervisor Carl Hussey did. He testified that Vice President Smith and himself spoke with half-bag employees Shirley Teamer, Dorothy Stewart, Josephine Benson, and Justine Harwell as early as December 1987; that Smith told these employees that their production report must be accurate concerning the number of pieces produced during time spent in the production of half bags. Smith told them, according to Hussey, that if they were placed on another job, they had to record the accurate amount of time spent on the other job as ''down time'' (Tr. 1359). Hussey also testified that between this December 1987 admonition by Vice President Smith and November 15, 1988, when Smith again called Benson into the office, Hussey spoke to Benson on several occasions concerning her reporting of production (Tr. 1382). He testified that he could not be specific when he talked to her about it, but spoke to her about reporting more production than he was getting through the production line (Tr. 1382). He did not talk to her about misreporting ''down time'' (Tr. 1383). Indeed, he said it was not only Benson, but the whole hemming department that gave him faulty production statistics when he was not getting actual production from their operations (Tr. 1383). Hussey admitted that he had never reduced to writing or made any other reports of conversations with Benson or any of the other employees concerning improper reporting of production (Tr. 1384–1385). He testifies that the reason that it was not reduced to writing was that there was no ''concrete evidence'' of misreporting (Tr. 1385). Ordinarily, he took the employees' ''word'' for their production and time because they were on an ''honor system'' (Tr. 1385).

On November 15, 1988, however, there were alleged discrepancies on the November 2 and 14 Benson production reports.

With regard to her November 2, 1988 report (G.C. Exh. 12(A)) she reported down time for the period 1:45 to 3 p.m. in the left-hand column of the submitted production report. This represented, as I understand it, and as the parties seem to concede, her actual report of the hours in which she had ''down time.''

Again, the incentive pay rate is for time spent in production; down time is the time listed or time spent not on the incentive-rated job to which she was assigned. It could be time spent waiting for materials, for broken sewing machinery, in stacking bags, etc. The greater the down time, the less time spent in actual production incentive-rated bags and therefore the creation of a higher rate of unit production. Higher unit production results in a higher pay rate.

On this same document, however, she claimed, for payroll purposes, 2 hours and 15 minutes of down time whereas her recorded actual down time (1:45 to 3 p.m.) is only 1 hour and 15 minutes. She testified that she actually had 2 hours and 15 minutes of down time because she was actually working, she said, on another down time job in addition (Tr. 869–870); and that when she attempted to explain that she had spent an extra hour on another down time job, Smith would not give her a chance to tell him about it (Tr. 870).

With regard to her production report of November 14, 1988 (G.C. Exh. 12(B)), she recorded down time on a par-

[21] In view of the several unfair labor practices found herein, including violations of Sec. 8(a)(3) and (5) of the Act and a conclusion that Respondent engaged in ''surface bargaining,'' I have determined that Respondent may not reach good-faith impasse in future bargaining in the presence of this unrescinded, unlawfully implemented insurance plan. *Storer Communications*, 297 NLRB 296 (1989). The unlawfully implemented plan must be rescinded at the Union's option.

[22] In view of the uncontradicted testimony that the half-bag employees Nabors, Teamers, Benson, and Harwell as well as Payne (the baler), all wore union buttons to work in October 1987, it is evident that Langston was referring to the physically separated half-bag department employees in his reference to ''troublemakers.'' I therefore find, contrary to Langston's denial, that he did refer to employees as ''troublemakers'' and that ''troublemakers'' referred to the employees in the half-bag department as a whole. ''Troublemaker,'' of course, refers to the employees being engaged in union activities. Cf. *Fern Terrace Lodge*, 297 NLRB 8 (1989).

ticular job from 9 a.m. to 9:50 p.m. as 1 hour and 50 minutes. She testified that it should have been 9 a.m. to 10:50 a.m. and when she tried to tell Smith of this mistake, at the November 15 meeting, he said he was not concerned (Tr. 863). Furthermore, Smith, in Hussey's presence, told her that she could not have produced 425 American Coal Oil bags from 9:50 a.m. to 1:20 p.m. as her November 14 production report stated. Smith to her, especially, that she could not produce the 425 large American Oil Company bags without a helper. However, Benson said she did not work on American Coal Oil bags that day; and told Smith that the 425 bags was not only accurate but that she had a helper (Tr. 867). Furthermore, she testified that she told him she was not on American Oil Company bags but on a different job which Smith himself had recorded on the production report when he spoke to her on November 15 (Tr. 867; G.C. Exh. 12(B)).

With regard to Smith having previously warned her, Harwell, and Stewart about misreporting on the production sheets, Benson denied that there had either been an oral or written warning (Tr. 862). Nor had any other supervisor warned her about misreporting (Tr. 862–863).

At the November 15 meeting, Benson admits that Smith told her that she was receiving a written warning but she denied that he ever gave her a written warning (Tr. 871). On the other hand, Respondent memorialized the November 15 meeting and there appears the statement (R. Exh. 6) that not only was she told she was being given a final written warning on misrepresenting production, but that she would be terminated if it was not stopped.

a. *Benson's suspension on November 22, 1988*

On November 22, 1988, Benson was suspended for 3 days for allegedly making errors on reports submitted on November 17, 18, and 21, 1988 (G.C. Exhs. 12(C) and 12(D)).

On November 22, she was called into the office by Supervisor Little and Wargo, the personnel director. They had the three production reports in hand at that time. Her November 21, 1988 production report, showed that she had recorded 205 sewing operations in the period 7:30 to 9:15 a.m. ''on and off.'' When Supervisor Tony Little asked her if she had done 205 bags in that period, she told him that she had done the bags ''on and off'' (Tr. 880–881); that she had indeed sewn 205 bags but had been interrupted in the sewing by Plant Manager Bill White who asked her to perform other jobs. Little was dissatisfied with her explanation and told her that he wanted her production reports to show production so that Respondent could understand what she was talking about (Tr. 882). When he remonstrated that her reporting of 2 hours and 15 minutes for loading the table was ridiculous (Tr. 882) Benson continued to affirm that she had recorded her time ''minute per minute,'' and offered to show him her own private records. He refused to see her private records and told her that she had recorded inaccurate down time (Tr. 882). She told him that her down time was greater than others because she had to walk to get her work whereas the plant manager brought work for other people right to the sewing machine (Tr. 882). She insisted on recording as down time the amount of time she spent going to and from areas for picking up work (Tr. 882). She testified that Supervisor Little did not want to hear her argument that ''down time is for loading tables, counting bags and picking up the bags'' (Tr. 883).

With regard to the reports of November 17 and 18, 1988 (G.C. Exh. 12(C)), Benson had claimed 70 minutes for loading a table. But Supervisor Little said that her reporting was inaccurate and he wanted her reports so that Respondent could understand her reports (Tr. 889). When Benson offered to redo the report, he said she could not redo it because Respondent wanted no mistakes rather than redoing of faulty reports (Tr. 889).

At the end of the conversation, Wargo told her that he wanted her to clock out and he did not want her doing any more of Langston's work (Tr. 889). She did so.

On November 23, 1988, the next day, she sought entry into the breakroom for the purpose of attending a meeting at which the union representatives were to discuss her discipline with Respondent but she was denied entry into the area. She testified that on other occasions, she had been permitted to use the breakroom on days that she was not on duty; that Respondent knew of this and had not prevented her from entering the breakroom. She also testified that nonemployees were permitted to join her and her sister in the breakroom from time to time.

Hussey admitted that he had never reduced to writing or made any reports of any conversations with Benson or any other employee concerning improper reporting of production (Tr. 1384–1385). He testified that they never had concrete evidence of wrongdoing before (Tr. 1385). He also testified that contrary to Benson's testimony, she did not have machine trouble (Tr. 1386) as she had claimed on the November 14, 1988 report (G.C. Exh. 12)), because he had checked with the machine mechanic. The machine mechanic told him that he had not worked on her machine all day (Tr. 1387–1388). He admitted that Benson insisted that the machine had been down and that she had produced the number of items reported on reduction reports (Tr. 1390). In any event, Hussey testified, as above noted, that although he may have given oral warnings to other employees about misreporting their production (Tr. 1374), there had never been any written warnings or suspensions to such other employees (Tr. 1375). Respondent's sole office clerical, secretary Linda Medal, was employed at the Arlington plant from March 31, 1987, through January 20, 1989. Among her duties was to check the daily production reports of the incentive-rated employees (Tr. 1608). She did the actual calculating of the incentive rate from the daily and monthly production reports (Tr. 1608–1609). In particular, with regard to her review of the daily production report for posting on the monthly production report, if there was anything ''that does not look right,'' she sent the daily production report to the manager with regard to those incentive employees (Tr. 1609). She reviewed every one of the incentive production reports for the accuracy of the calculations (Tr. 1609–1610) and it was she who spotted the apparent errors on the Benson production reports. She testified she gave the Benson production reports either to Carl Hussey or to George Smith. The plant manager handles the discrepancies and, after resolution of the discrepancies, the production report is returned to Medal (Tr. 1614).

Medal testified that she had never seen as many as four erroneous reports from a given employee in any 1-month period like Benson's (Tr. 1624–1625). She recalled that one employee (Erma Thompson) (Tr. 1647) persistently reported each workday as consisting of 8-1/2 hours. When Medal asked her where she got the 8-1/2 hours from (Respondent

pays only for 8 hours), Thompson told her that she records the half-hour lunch hour as part of her down time. With this explanation Medal simply did not pay her the extra half-hour notwithstanding that Thompson continues to report an 8-1/2-hour day as her workday (Tr. 1649).

Another employee's (Woodland) daily production sheets were also a matter of concern to Medal because Woodland failed to indicate the amount of time she spent on each job. This made it impossible to calculate the amount of pay she was entitled to for each of her incentive-rated production jobs (Tr. 1650–1651). In addition, Woodland's daily production sheets failed to indicate which job the claimed down time applied to (Tr. 1651). These Woodland reporting errors occurred in March 1988, (G.C. Exhs. 22–25) and Medal reported Woodland's erroneous production reports to either Plant Manager Hussey or General Manager Smith (Tr. 1652). After Medal spoke to Woodland about her misreporting, she not only reported total down time but indicated the segments of down time (Tr. 1655). On the other hand she has continued to turn in reports which reflect her old way of reporting which failed to show the segments of down time referring to particular jobs. Medal testified that all that Respondent did when this relapse was noted was to ''remind her'' of her improper reporting (Tr. 1655).

Secretary Medal did not know whether Woodland was ever disciplined for her repeated submissions of inaccurate production reports on her incentive-rated jobs, but it is Medal's obligation, as part of her job, to be aware of discipline administered to employees (Tr. 1657). She knew that Benson had been disciplined. She did not know of any other employees who were disciplined for turning in improper production reports (Tr. 1658). The only employee who she knew was disciplined was Benson (Tr. 1658).

b. *Discussion and conclusions*

In substance, by virtue of paragraph 25 of the third consolidated complaint, the General Counsel alleges, as violations of Section 8(a)(3) and (1) of the Act, a November 14, 1988 written warning Benson, the November 22 suspension of Benson; and the November 23, 1988 denial to Benson of access to the employee break area.

(1) The elements of a prima facie case are present here with regard to all three of the allegations of Respondent's conduct with regard to Josephine Benson. Thus, the record demonstrates Respondent's animus against unions, in general, and the Charging Party, in particular. Josephine Benson was in the half-bag department, identified by Robert Langston as the department containing the [union] ''troublemakers.'' In addition to her openly wearing the union button and other union identification prior to the election, it is Benson's uncontradicted and credited testimony that she was regularly an employee member of the Union's collective-bargaining committee and attended all but two of the approximately 30 collective-bargaining sessions between January 15, 1988, and February 1989. Thus the prima facie case consists of Respondent's *animus* and its obvious *knowledge* of Benson's union activities prior to the November 1988 discipline which it administered against her.

(2) Weakening the prima facie case, however, is the fact that in respondent's prior dealings with the ''troublemakers'' in the half-bag department, it had discriminated, according to General Counsel, against members other than Benson. In particular, Benson was awarded work when other of the union activists were not. If that is so, Respondent was not necessarily singling out Benson, from among the union activists, for its unlawful attention. I refer to the allegation of violation of Section 8(a)(3), supra, where Teamer and Nabors were not given overtime on October 10, 1987, but half-bag department union supporters Harwell, Stewart, and Benson were awarded overtime. On the other hand, however, the law is that Respondent need not single out the most prominent union activists; it may nevertheless be guilty of unlawful discrimination, in violation of Section 8(a)(3) and (1) of the Act, if it discriminates against an employee whom it knows to be a union activist notwithstanding that she is not the most prominent one in the group.

(3) Respondent's defense[23] apparently rests on the position that Respondent may not be saddled with Benson's repeated, erroneous production reports even after she had been previously warned. In this regard, General Counsel did not attempt to refute Respondent's evidence that not only Benson was warned, but Harwell, Stewart, and Teamer were also warned for improper and erroneous production reports. Respondent is quite correct in asserting that Benson's union activities and union sympathies may not create a shield against discipline for repeated improper work, especially since Respondent, on this record, had previously warned her of her submissions of improper reports. That Respondent also warned the other union activists certainly adds to the conclusion that Respondent was not singling out Benson, particularly not singling her out because of her union activities.

(4) The record, however is barren of any suggestion that Respondent *ever* took action other than verbal warnings against *any employee* for erroneous reporting on the production sheets involving incentive jobs. The testimony of Plant Manager Hussey and of office clerical Medal demonstrates that Respondent had employees who, in the past, submitted erroneous reports and had suffered nothing other than warnings. In particular, both Hussey and Medal admit that there had never been a written warning, much less further discipline like suspension, *ever* meted out to *any* employee for such misconduct. Furthermore, it was Medal's business obligation to know of any such punishment and she could not recall it. Hussey was even more particular in recalling that, in fact, there had been none. The most telling evidence suggesting disparate treatment of Benson was Medal's testimony, as General Counsel noted, that employee Woodland not only repeatedly submitted production reports without specifying the down time, but after Medal warned her that such conduct was improper and such conduct temporarily changed, Woodland nevertheless slipped back into her old habits and improperly reported down time. No action was taken against Woodland: ''all we do is remind her'' (Tr. 1665).

(5) Respondent is under no obligation to tolerate employees who misreport their hours, thereby gaining improper income from showing greater rate of production in a given amount of the time and thereby increasing their incentive rates improperly. Respondent, a fortiori, should not be obliged to put up with such misconduct after warning an employee of it and the employee nevertheless continues in that

[23] Respondent failed to include in its brief a statement of facts or a discussion of the allegation with regard to discrimination against Benson.

action. But what Respondent may not do is treat employees disparately on the basis of their union activities. That is forbidden ''discrimination'' within the meaning of Section 8(a)(3) of the Act.

In view of Respondent accepting the continued erroneous production reports of Erma Thompson to the present day, and having permitted employee Woodland to slip back into erroneous production reporting habits with nothing more than reminding her to cease erroneous reporting, Respondent may not be heard to say that its treatment of Josephine Benson was not disparate. The testimony that Benson's misreporting was more egregious than the other employees does not stand up to the record. For Woodland not only had a continuous series of reports, like Benson, which were erroneous, but she was permitted, without further Respondent retaliation, to slip back into erroneous reporting habits with no action taken against her other than ''reminding'' her. Benson received a written warning and then a disciplinary suspension.

Respondent, on this record, was under an obligation to submit, if necessary, rebuttal evidence, if it could, to demonstrate why Woodland and Thompson were treated differently than Benson. Perhaps Benson's acts, unlike Woodland and Thompson, cost money. If that was the distinction, Respondent has not told us. Respondent failed in its proof. It is on the basis of evidence of this disparate treatment, unrebutted, that I find that Respondent's unlawful written warning of November 15 (R. Exh. 6) and its November 22 suspension of employee Benson, a prominent union supporter, because of her misreporting, that Respondent violated Section 8(a)(3) and (1) of the Act. Respondent in the presence of a prima facie case failed to establish that it would have taken this disciplinary action regardless of Benson's union activity. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

With regard to the allegation that Respondent violated Section 8(a)(1) in denying Benson access to the employee break area on November 23, 1988 (when the Union, on her behalf, was contesting the above written warning and suspension), I recommend that the Board dismiss such allegation. The most that General Counsel proved is that *off-duty* employees were *permitted* access to the breakroom. General Counsel did not prove that suspended employees were denied access to the breakroom. Where the proof showed that *strangers* were allowed into the breakroom, there is no showing that Respondent knew of their presence. That Josephine Benson may have been *unlawfully* suspended does not change the result. Respondent's property right was sufficient to bar her entrance until such time as there was a resolution of whether she had been improperly suspended. Cf. *Jean Country*, 291 NLRB 11 (1988). I therefore shall recommend to the Board that that allegation (par. 25(c)) be dismissed even if, as I have found, Respondent discriminated against Josephine Benson in issuing the underlying written warning and the underlying suspension. See *New Process Co.*, 290 NLRB 704 (1988).

13. Alleged violation of Section 8(a)(3) and (1) of the Act; 1-day layoff of employees Benson, Stewart, Nabors, and Sellers

By paragraphs 7, 8, and 9 of General Counsel's complaint, issued March 17, 1989, General Counsel alleges that a 1-day layoff on February 15, 1989, of employees Benson, Stewart, Nabors, and Sellers was discriminatory and a violation of Section 8(a)(1) and (3) of the Act.

In February 1989, Respondent was no longer manufacturing half-bags at the Arlington plant. These four employees, formerly in the half-bag department, were now hemmers, sewing bulk bags. On February 14, 1989, with two hemmers working as inspectors instead of hemming, work was slow in the hemming section (Tr. 1279). Plant Manager Norman Neville called in four hemmers (Benson, Stewart, Nabors, and Kathleen Sellers) and told them that they were being laid off for a day due to a lack of work (Tr. 848). All four of these hemmers had previously performed inspection work. As General Counsel notes, Respondent did not use plantwide seniority in the layoff; rather, it laid off four of the hemmers with less seniority than hemmer Justine Harwell. Harwell was acknowledged by all the employees as the most senior hemmer. Neville told the employees who were about to be laid off that Harwell would be retained for work in case there was an emergency order. The employees were told to report for work on the day following the 1-day layoff, i.e., on Friday, February 16.

On the next day, February 15, the four hemmers did not report for work. On that day, there was no hemming except possibly by Harwell who had been retained. There were not enough cut panels for the retention of any large number of hemmers (Tr. 1757–1759).

By 1 p.m. February 15, however, Neville realized that on the basis of current inspection, the inspectors were not getting out enough bags to meet a rush order. He told the inspectors that they would either have to get out more bags or would have to stay over due to the company's obligation to complete the rush order.

Prior to Neville notifying the four employees of the layoff of February 15, Nabors and Harwell continued to wear union insignia. While Harwell remained on the union negotiating committee, Nabor did not. Although it is not entirely clear that Nabors ceased being on the negotiating committee prior to February 14 (Tr. 691), it is clear that Harwell, the most senior employee, and a current member of the negotiating committee, was specifically chosen to work notwithstanding the layoff of the other employees.

In addition, Shirley Teamer, known to Respondent as the chief union steward, worked on the day of the layoff whereas the others did not (Tr. 718–721). It may be recalled that Teamer was one of the ''troublemakers'' and worked on this same day that Nabors, no longer a member of the bargaining committee, was laid off.

Discussion and Conclusions

General Counsel's argument (Br. p. 44) is exclusively directed to the conclusion that Respondent showed no business justification for the February 15, 1989 layoff. General Counsel argues that the selection of the laid-off employees was based on those who had demonstrated their support of the union. He directs most of his attention to the fact that Plant Manager Neville laid off the four employees in spite of the rush order on which the employer was working and the pendency of 21 other orders. General Counsel notes that the four laid-off employees were capable inspectors and that, comparing the February 15, 1989 layoff to the October 10, 1987 refusal to permit Shirley Teamer and Rosie Nabors to work overtime, the same motivation should apply.

I have concluded, elsewhere, that Respondent's animus, flowing directly and explicitly from its president, Robert Langston, together with its knowledge of the union activities of these employees, brings otherwise work-related decisions within the orbit of a prima facie case. *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under the *Wright Line* analysis, however, Respondent may defend either rebutting the General Counsel's prima facie case of unlawful discrimination or by establishing that it would have taken the same action regardless of the protected activity supporting the prima facie case. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400–401 (1983). See *NKC of America*, 291 NLRB 683 fn. 4 (1988).

With regard to rebutting General Counsel's prima facie case, I conclude that it has become so weakened as to bring the case within the legal conclusion that, on a preponderance of the credible evidence, the prima facie case of discrimination has been effectively rebutted. In this regard, there are two outstanding factors which substantially rebut the prima facie case: (1) Harwell was specifically chosen as the employee to work during the layoff of the four others notwithstanding that, at the time of the layoff, Harwell had become an employee member of the union negotiating committee whereas Nabors had ceased being on the committee and thus to some extent had ceased demonstrating an element of open union support Respondent's clear and definite selection of union-active Harwell to work while laying off nonactive Nabors, sets off the distinction contrary to the General Counsel's showing of prima facie discrimination. In addition, (2) Shirley Teamer, the chief steward continued to work notwithstanding Respondent's lesser need for employees. Teamer, it must be recalled, was allegedly the subject of Respondent's unlawful attention in an October 10, 1987 incident. Here, she remained at work at the same time that Nabors had been laid off.

In short, Respondent's retention of Teamer and Harwell in employment, these employees being among the most noteworthy union supporters, in my judgment, has a substantial negative effect on the strength of General Counsel's prima facie case. There has been no reason advanced why Respondent was ''discriminatory'' against lesser union supporters and not laying off prominent union advocates. I believe that the prima facie case has been so weakened by Respondent's conduct contemporaneous with the alleged unlawful layoff, as to not serve as a proper vehicle for finding a violation of Section 8(a)(3) and (1) of the Act, i.e., a preponderance of the credible evidence fails to support proof of unlawful discriminatory action.

Moreover, I conclude that notwithstanding any prima facie case, thus weakened, Respondent has supported its burden to show that, in any case, it laid off the four hemmers, notwithstanding any prima facie case, for good and sufficient business reasons. *NLRB v. Transportation Management Corp.*, supra. Thus notwithstanding that the four laid-off employees could have performed inspection work, General Counsel did not undermine Respondent's testimony that there was not enough hemming work for them; and that Respondent had a sufficient number of employees on hand to perform the inspection work. The fact that Plant Manager Neville discovered, shortly after noon, that he needed to have employees turn out more work or work them overtime, is not sufficient to show that on the previous day, at the time of the layoff decision, he knew of this possibility. There is no proof that Respondent could reasonably have foreseen the eventuality of a lack of production by the existing inspectors.

In short, I conclude both that Respondent effectively rebutted General Counsel's prima facie case; and in addition that Respondent proved that it took the action of laying off the four hemmers for good and sufficient business reasons wholly apart from the existence of any prima facie case. The allegations of an unlawful layoff of four employees on February 15, 1989, should be dismissed as unproven.

14. Alleged violation of Section 8(a)(3) and (1) of the Act in Respondent's conduct against employee Cyrus A. Payne

In a complaint issued during the hearing in this matter, the General Counsel alleged, further, that on March 3, 1989, Respondent, by refusing to allow its employee, Cyrus Payne, to alter his scheduled working hours, violated Section 8(a)(3) and (1) of the Act.

Cyrus Payne is a baler in the half-bag department. He wore union button before the election and was asked by Plant Manger White to remove the button (Tr. 1128). First stating that he had a right to wear the button, Payne nevertheless complied. A short time thereafter, White told Payne that he could ''put the damn button back on'' (Tr. 1128). On the day of the election, Payne wore a union T-shirt and a union cap at work (Tr. 1130). He was also an employee-member of the Union's contract negotiating committee and attended all but 2 or 3 of the 35 collective-bargaining sessions.

The facts concerning the alleged discrimination against Payne are not in dispute.

Under Federal auspices, Payne became a student in a truckdriving school. The course of study was divided into ''home study'' and actual truckdriver training. After Payne completed the home study section of the course, he received notice from the school (G.C. Exh. 14) that he was to begin his actual truckdriver training on March 11, 1989. The notice specified that he would be trained on both Saturdays and Sundays for eight consecutive weekends (G.C. Exh. 15).

Payne took the notice to Plant Manager Neville and said that he would like to make weekly arrangements to leave early on Friday and return early on Monday for truckdriver training (Tr. 1138–1139). Neville told him that he did not believe that Respondent would permit him to do so but would first have to make a phone call (Tr. 1139) and would get back to him. On the next day, on a Friday, in early March 1989, Neville told Payne not to take the action ''personally'' but handed Payne a letter from Respondent (G.C. Exh. 16).

The letter, dated March 1989 states:

> In response to your request for time off for the next eight (8) consecutive Fridays and partial Mondays beginning March 10, 1989, I must remind you that your primary responsibility is to attend to your duties every working day.
>
> While I applaud your initiative to learn a new skill; at this time our production schedule will not allow us to release you for such extended times.

It is not disputed that Respondent employs other employees who have worked as balers. Ray Horne, Ken Harwell, and Wayne Wherry had, on prior occasions, performed baling work. Harwell had been a full-time bailer (Tr. 1219).

General Counsel's evidence of discriminatory motive rests substantially on testimony of alleged disparate treatment obtained from a former employee, Otha Shaw. Shaw was a full-time employee in the period 1986 through mid-April 1988, when she ceased working to become a full-time student.

In April 1988, Shaw rejected Plant Manager Hussey's invitation to return to work because she was going to school. When he called her again in October 1988 (Tr. 1187), she agreed to return to work as long as it did not interfere with her school schedule. Hussey told her that she could make her own hours and Respondent would work around her school schedule (Tr. 1187). Shaw testified that she then worked irregular hours, sometimes from 10 a.m. to 4 p.m.; sometimes she would take 3 days off and just work 2 days during the week (Tr. 1188–1189). She took maternity leave in the spring of 1989.

Shaw, however, did not work on the production line. Rather, she was the only person employed as a ''vinyl and specialty bag maker'' (Tr. 1195). On specialty bags, she made the whole bag, performing all functions except the inspection. On the other hand, she admitted that when other employees had a day off or they needed someone to fill in and she did not have any specialty bags to work on, she would engage in regular production (Tr. 1192).

Specialty bags are sample bags. Only two or three are made for particular customers (Tr. 1198). Unlike production bag makers, Shaw not only cuts the bag but assembles it (Tr. 1200), and is often obliged to read a specification sheet (Tr. 1203). She ordinarily worked 90 percent on vinyl bags and 10 percent on specialty bags (Tr. 1204).

Discussion and Conclusions

General Counsel's case rests on the alleged disparate treatment accorded employee Otha Shaw who manifested no union sympathy (she said she was neither for nor against the Union and never wore union insignia) compared to Cyrus Payne, a known union supporter.

General Counsel's case of disparate treatment relies on the assertion that Respondent should have exercised its discretion in granting Payne the requested time off because, in permitting Otha Shaw to ''work around'' her scholastic schedule, Respondent had exercised its discretion in permitting an employee time off in order to work irregular hours. General Counsel requests the drawing of an inference of unlawful motivation because Respondent did not exercise similar discretion in granting Cyrus Payne time off to work around *his* educational requirement.

While it is true that Respondent had other employees who were capable of performing the work of a baler, the cases of Otha Shaw and Cyrus Payne are so dissimilar in terms of what work they actually performed, that it cannot be said that there was disparate treatment. Thus, part and parcel of Otha Shaw's job was that her presence or absence would not disrupt production. She created vinyl and specialty bags at her own rate without reference to, much less interfering with, the production and shipment of bulk bags. Indeed, Otha Shaw returned to work only as long as it did not interfere with her studies (Tr. 1187) and that arrangement was made a condition of her return to work at all. On the other hand, Cyrus Payne's work was intimately concerned with the production process since he was Respondent's only full-time baler. To remove other employees, such as Horn, from their assigned work to become the substitute baler, would mean a shifting of employees on the production line to fill Horn's spot or the work of any other employees assigned to the work of a baler. It is apparent, therefore, that Respondent properly asserts that in dealing with the cases of Shaw and Payne, Respondent was dealing with dissimilar situations: Shaw, a specialty employee, conditioned her accepting Respondent's offer of employment on her ability to set her own hours of work; whereas Payne was a production employee whose function as a baler must fit in with Respondent's production line of bulk bags. The employee situations being substantively dissimilar, there can be no conclusion of disparate treatment in like cases from which an inference of unlawful motivation might be drawn based in the presence of Respondent's union animus, together with its knowledge of Payne's considerable union activities. Moreover, there is no evidence of any independent unlawful motivation with regard to Respondent's refusal to grant Payne special time off for his driver training.

The allegations of unlawful discriminatory treatment of Cyrus Payne constitute the sole substantive allegations in the separately issued complaint in Case 26–CA–13115. It is my recommendation that this complaint be dismissed in its entirety.

15. Alleged violations of Section 8(a)(5)

Surface Bargaining

In paragraph 26 of the third consolidated complaint, the General Counsel alleges that Respondent ''by its overall conduct'' (including General Counsel's allegations of the March 15, 1988 transfer of unit work from Arlington to Memphis; Respondent's failure to provide information to the Union regarding the transfer of such unit work; the failure to furnish the Union with time studies; by direct dealing with employees, bypassing the union; by unlawfully implementing changes in the employees' insurance plan; by failing to meet with the Union between September 6 and November 16, 1988, at a time during which Respondent declared the existence of an impasse; by Respondent's withdrawal of its agreement on holidays; by failing to grant to its unionized employees the Section 125(d) Federal Tax Code option; by insisting on its right to change the identity of the insurance carrier and the terms of insurance; and with regard to alleged arbitrary and shifting positions with regard to the issue of union dues checkoff), engaged in bad-faith bargaining.

In support of its assertion, General Counsel argues that the Board's precedent in *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984), and *Houston County Electric Cooperative*, 285 NLRB 1213 (1987), demonstrates that Respondent's conduct meets the Board's criteria to infer the existence of surface bargaining. In particular, General Counsel lists the ''seven traditional indicia of surface bargaining . . . .'' *Houston County Electric Cooperative*, supra, as they appear in *Atlanta Hilton & Tower*, supra: delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, with-

drawal of already agreed-upon provisions, and arbitrary scheduling of meetings. General Counsel urges the existence here of five of the seven ''traditional indicia'' and argues that an inference of surface bargaining flows therefrom.

On the other hand, all cases of alleged surface bargaining, at bottom, are factually idiosyncratic. This case forms no exception. For instance, General Counsel would have me rely on Plant Manager Hussey's statement to employees that as soon as Respondent got rid of the Union, they would get a pay raise. I have found, as General Counsel alleged, that such conduct demonstrates that Respondent has no interest in bargaining in good faith with the Union and led the employees to believe that Respondent held in its own hands the full responsibility for granting pay raises to employees. I conclude, in agreement with General Counsel, that such conduct amounts to an effort to undermine the Union and, indeed to bypass the Union in granting employees wage relief, all in violation of Section 8(a)(5) and (1) of the Act. But Hussey's conduct, while unlawful, is not the type of studied employer-sponsored bypassing that *Atlanta Hilton & Tower*, supra, contemplates as one of the indicia of bad-faith bargaining. It is the action, albeit of the plant manager, of a supervisor talking to a few individuals rather than Respondent acting on a unitwide basis to bypass the Union and to undermine the union's authority. It is such latter activity which would constitute, in my judgment, an activity demonstrating bad-faith bargaining. Hussey's conduct, in my judgment, does not itself demonstrate surface bargaining, notwithstanding that it cannot be permitted to go unremedied. It is, however, a demonstration of Respondent's disregard of, and contempt for, at a high managerial level, the existence of the Union as a statutory bargaining partner.[24] Hussey did not get the idea of ''once we get rid of the Union'' from nowhere. That came from Langston.

To decide whether an employer is bargaining in good faith, the Board is obliged to look at the sum of the evidence, not merely the pieces, *NLRB v. Stanislaus Importing Co.*, 226 F.2d 377 (9th Cir. 1959):

> A state of mind such as good faith is not determined by a consideration of events viewed separately. The picture is created by a consideration of all the facts viewed as an integrated whole.

Consistent with General Counsel's allegation of surface bargaining, however I conclude that Respondent, in violation of Section 8(a)(5) and (1) of the Act, did engage in mere surface bargaining. In this regard, I choose to characterize Respondent's conduct as merely engaging in a game of ''cat and mouse'' with the Union, coming to apparent agreement on eight or nine minor matters, see generally General Counsel's Exhibit 3(H) (recognition, company-union relations, call in pay, overtime, payday, jury service, first aid cabinet, savings provisions, sick pay, bereavement pay) and not coming to agreement on the major issues (management rights, no-strike no-lockout, union stewards, union visitation, grievance and arbitration, seniority, job vacancies, layoff and recall, hours of work, meal and rest periods, wages, vacations, holidays, insurance, pension and retirement, leaves of absence, discipline and discharge, plant rules, substance abuse, plant safety and security, physical examination, temporary job assignments, job classifications and duties, special categories of employees, and duration and termination of agreement).

In reaching the conclusion that Respondent engaged in surface bargaining, it is unnecessary in this case, to discuss the ''reasonableness'' of Respondent's substantive bargaining positions or couching them in terms of offers ''which no self respecting union could be expected to accept.'' See, for instance, *NLRB v. Tomco Communications*, 567 F.2d 871, 883–884 (9th Cir. 1978). Rather, here, the basis for this conclusion rests on Respondent's unequivocal statements of union animus prior to the election and away from the bargaining table and its bargaining posture with regard to the violations of Section 8(a)(5) and (1) particularly found herein.

There can be no question that Respondent's expressions of union animus before an election are not a dispositive guide to its willingness to bargain in good faith once the union is certified as the statutory bargaining representative. On the other hand, such statements of animus from Respondent's president, the chief operating officer, cannot be lightly dismissed. They must be placed in the perspective of analyzing an entire matrix of facts from which an inference of bad-faith bargaining is either found or rejected.

What cannot be lightly rejected, in this case, is the preelection statement to all unit employees of Respondent's highest officer, President Langston, that he was aware of Respondent's obligation to bargain in good faith if the Union won the election; but also his admonition to his employees, that in such event, the Union might walk away (as a union had done at the Memphis plant) or it might take 8 to 10 years for them to get a contract. The futility in employees' selecting a union and the futility of bargaining with Respondent could not be more clearly made know to Respondent's employees and to the Union. That President Langston may have illustrated his remark about ''8 to 10 years for a contract'' in terms of what *other* employers had done, does not disguise the employer or make his homily any the less instructive of Respondent's state of mind in going into and in continuing negotiations with the Union should it be selected. Further, when the plant manager thereafter speaks of pay raises to unit employees after Respondent *gets rid* of the union, he is merely parroting his president.

Equally, there can be little doubt that the obligation to bargain collectively does not compel either party to agree to a proposal or require the making of a concession, *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952); 29 U.S.C. § 158(d). Nor may the Board directly or indirectly, compel concessions or otherwise sit in judgment on the substantive terms of collective-bargaining agreements. *H. K. Porter v. NLRB*, 397 U.S. 99, 106 (1970). The Board is forbidden to compel agreement when the parties are unable to agree, for such action would violate the fundamental premise on which the act is based: private bargaining under government supervision of the bargaining procedure, without any official compulsion over the terms of the contract (*H. K. Porter*, supra, 397 U.S. at 108). As the Board stated in *Rescar, Inc.*, 274 NLRB 1, 2 (1985):

> It is not the Board's role to sit in judgment on the substantive terms of bargaining, but rather to oversee the

[24] Respondent has failed to brief the issue of Respondent's alleged surface bargaining. This may flow from its conclusion that all the allegations of all the several complaints are without merit and that it did not violate the Act.

process to ascertain that the parties are making a sincere effort to reach agreement.

I have nevertheless concluded (1) that Respondent bargained in bad faith, violating Section 8(a)(5) of the Act, by withdrawing from or repudiating its agreement on holidays while bargaining in or about November 1988; (2) that Respondent, in violation of Section 8(a)(5) and (1) of the Act, sought to impasse, and then implemented, unilateral control over future changes in the identity of the insurance carrier, the right to unilaterally change policy coverage and the right unilaterally change claim procedures thereunder; (3) Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain in good faith with the Union on a dues-checkoff clause by rejecting checkoff on grounds demonstrating no legitimate reasons for its position; and (4) Respondent, in violation of Section 8(a)(3) and (1) of the Act, issued a discriminatory and unlawful written warning to its employee, Josephine Benson, in or about November 15, 1988, and thereafter suspended her on November 22, 1988, in violation, again, of Section 8(a)(3) and (1) of the Act.

When the above four findings of violation of Section 8(a)(5), (3), and (1) of the Act are joined by Respondent's plant manager's unlawful statement to a handful of employees that they could expect a raise when Respondent *gets rid of* the Union, and by Langston's prior, open union animus and *his* advising the employees that he would ''go through the motions'' for 10 years, there is an unmistakable matrix of facts which, while they do not precisely meet the seven ''traditional indicia of bad-faith bargaining'' mentioned in *Atlanta Hilton & Tower*, 271 NLRB 1600, supra, they do, nevertheless, indicate that the Respondent was not making a sincere effort to reach agreement. In short, an examination of Respondent's preelection admonitions, the content and process of Respondent's contract proposals and the method of its dealing with the Union, demonstrates that Respondent's bargaining posture was designed and intended to frustrate agreement notwithstanding the minor agreements already reached. Compare *Rescar, Inc.*, 274 NLRB 1 (1985), with *Harrah's Marina, Hotel & Casino*, 296 NLRB 1116 (1989), and cases cited therein. In sum, I conclude that Respondent's bargaining was merely the paying of lip service to its 8(d) obligation to bargain in good faith, *Butera Finer Foods*, 296 NLRB 950 (1989), and that it was engaged in unlawful surface bargaining within the meaning of Section 8(a)(5) and (1) and Section 8(d) of the Act, as alleged. Respondent's conduct was perhaps more skillful and flexible than that of other employers who have been found guilty of surface bargaining, but I regard Respondent's bargaining posture and the results as consistent with President Langston's preelection admonition, demonstrating that he was going through the motions of bargaining. See, e.g., *Overnite Transportation Co.*, 296 NLRB 669 (1989). What was perhaps an alternative to this lip-service bargaining was Respondent's willingness to agree to a contract whose terms Respondent prescribed. But this is not good-faith bargaining: it is merely a direction to do it ''my way'' as the only way. To suggest that this is just hard bargaining is to avoid the mutual obligation to compose differences. Respondent failed to support its side of the obligation. This had been Respondent's position since the commencement of bargaining.

16. Alleged violation of Section 8(a)(3); failure to pay holiday pay to Ernestine Hayes

Hayes, continuously employed as a bulk bag sewer since May 1985, had been a prominent union supporter wearing union buttons, a union T-shirt and other union insignia before the election. After the election, she was a regular member of the union contract negotiating committee. Indeed, Respondent's personnel director, Wargo, identified her as a prominent member.

On March 7, at work, Hayes hurt her back. The course of the injury is not revealed in the record. Respondent's office clerical, Diane Bernardi, drove Hayes to the Baptist Minor Medical Clinic in Memphis. She was treated at the clinic, told to return for a recheck on Friday, March 10, 1989, and told not to return to work pending such recheck (G.C. Exh. 31). On March 10, she was rechecked and permitted to return to work the same day. Respondent concedes (R. Br. p. 8) that the diagnosis at that time was ''back strain.'' The physician, however, noted that Hayes could return ''to full duties immediately with no restrictions'' (R. Exh. 44).

On Monday, March 13, Hayes came to work but left, complaining of pain. She returned to the Baptist Minor Medical Center, was seen and referred to a specialist for examination on Friday, March 17. She was told not to return to work prior to the March 17 appointment (G.C. Exh. 31).

On March 17, Hayes was seen by a neurosurgeon, Dr. Engelberg, who scheduled a bone scan for the following Monday, March 20. On March 20, however, the doctor's office notified Hayes that there had been no workman's compensation authorization for the bone scan. Hayes then chose not to have the procedure done (at her own cost) but to await for authorization (G.C. Exh. 31). The doctor instructed her to return to work (Tr. 192).

Hayes returned to work on March 22 and worked a full day. She also worked on March 23 but left about noon (Tr. 2193) and went to the doctor's office (Tr. 2194) because she was experiencing pain (Tr. 2177). On March 23, when she felt this pain, she called her lawyer who told her to call the doctor (Tr. 2177–2178) who told her to come in. After speaking to the doctor on the phone, she told Plant Manager Bill White that she was in pain and that she was going to see the doctor. She then punched out, and went on the next day to the doctor's office on March 24 (Good Friday), but was notified that the Company had still not authorized the payment for the back scan test and that she could not be further treated without the results of such a test. Dr. Engelberg told her he could not authorize her to miss work (G.C. Exh. 31).

Hayes did not work on the succeeding Monday (March 27) or Tuesday (March 28).

On Wednesday, March 29, Hayes did not work and underwent a bone scan examination under Dr. Engelberg's supervision. The procedure was paid for by Respondent's workman's compensation insurer. As a result of the bone scan, there was no suggestion of surgery and no further medication (Hayes was apparently already on medication, Tr. 2195). Hayes admitted that Dr. Engelberg did not suggest anything or prescribe anything different from what she had experienced in the period March 23–30 (Tr. 2195). After the back scan examination, Hayes was told to ''go back to work'' (Tr. 2182–2183).

On Thursday, March 30, Hayes returned to work and brought in a doctor's statement. This statement, dated March 29, 1989, signed on behalf of Dr. Engelberg, noted that Hayes was to return to work March 30 (the day after the back scan examination) with no limitations on her working ability (G.C. Exh. 30).

On March 31, a payday, Respondent paid Hayes for the Good Friday holiday (March 24).

In a subsequent pay period, the exact date being unspecified on the record, Respondent changed its mind and deducted the pay for the Good Friday holiday from Hayes' succeeding paycheck.

The evidence shows that on March 20 (Monday) Plant Manager Bill White and General Manager Mack Elgin instructed office clerical Diane Bernardi to speak with Dr. Engelberg and get a statement from the doctor whether Hayes was supposed to be working (Tr. 2496–2497). Bernardi did speak with Engelberg's office. She said that the telephone call was prompted by the fact that the doctor told Hayes to return to work after her examinations of March 7 and that thereafter, she returned to work, periodically leaving because of complaints of back pain. Bernardi testified that, insofar as she understood the instructions from Elgin and White, they wanted her to discover where Respondent stood on the issue of whether Hayes was supposed to be at work (Tr. 2497). When Hayes returned to work on March 30, Bernardi asked her whether there was any medication that Respondent should know about (in order to supply her) or any other matter that should be brought to Respondent's attention. Hayes said that there was none and that she would return to work (Tr. 2502).

On the date that Respondent subsequently deducted the holiday pay from Hayes' paycheck, Personnel Director Wargo drafted a memorandum to be given to Hayes and to be signed by Plant Manager Bill White.

Apparently on April 4, 1989, Respondent served on Hayes the following memorandum:

> The holiday pay policy in the employee handbook requires that an employee work the day before and the day after a holiday in order to receive holiday pay. There are certain excuses for missing the day before or the day after, and these are in the handbook.
>
> You were absent part of the day before and the day after the Good Friday holiday. You were paid holiday pay based on your statement that your absence on Thursday was because of hurting. However, to date you have not provided a certificate from your doctor verifying the illness as required by company policy.
>
> You have until the close of business Friday, April 7, to submit the doctor's statement verifying the illness from Thursday, March 23–March 29. Unless you do so, the holiday pay will deducted from your check.

Hayes testified that she missed work on Monday, March 27, and Tuesday, March 28 because her back continued to hurt (Tr. 2185).

After her return to work she did not often miss work although she testified that her back continued to hurt ''off and on'' (Tr. 2185–2186). Since April 1989, it appears that her back is hurting less and she is missing less work (Tr. 2186).

On May 30, 1989, the Union accused Respondent of unilaterally changing the eligibility for holiday pay in the case of Ernestine Hayes and alternately suggested that there had been an honest mistake in Respondent's subsequent deduction of the holiday pay from her paycheck. It requested a correction of his error (G.C. Exh. 40). In its June 16, 1989 response (G.C. Exh. 11), Respondent stated that Hayes' supervisor asked her to verify the reason for her absence on March 27; and would have accepted a doctor's note to satisfy that request. Respondent asserts that Hayes, by virtue of Respondent's April 4 memorandum to Hayes, was given ample notice to provide the documentation or lose the holiday pay. In view of her failure to provide the requested verification of her absence, the holiday pay was deducted from her paycheck. This letter apparently was based on a decision of Respondent's president, Robert Langston, in conjunction with Ron Wargo, to deduct the Good Friday holiday pay unless Hayes made a more specific doctor's statement. Hayes never presented any such documentation that her absence after the holiday was due to a work-related injury. (Tr. 2135; 2137.)

Wargo's testimony is undenied that Respondent, in the past, has denied holiday pay to other company employees (Tr. 2165–2167; R. Exh. 46). In none of these cases, however, was the failure to pay for the holiday due to an on-the-job injury (Tr. 2168).

a. *Respondent's handbook holiday pay policy*

Company policy regarding payment for holidays is found at pages 16, 17, and 26 of the employee handbook (G.C. Exh. 29; R. Exh. 4). The handbook lists Good Friday as a holiday.

Eligibility for the paid holidays requires various conditions to be fulfilled. The first is employment for a minimum of 90 calendar days. The second condition is that the employee must work the regularly scheduled day before and after the holiday. The third condition is that if an employee is absent on either of the above qualifying days, holiday pay will be given provided the absence is due to one of the following reasons:

> A. Absence due to work related injury.
> B. Absence with written doctor's certificate (verifying employee's illness).
> C. Military obligation.
> D. Bereavement.
> E. Jury duty.

At page 26 of the handbook (R. Exh. 45), there is a section entitled ''Return to work after absent [sic] due illness/injury.'' That section provides: it may be necessary for you to provide a written doctor's release to return to work in the following circumstances: ''(1) . . . (2) Injury, non-industrial, resulting in absence from work for one or more days. (3) Hospitalization for any reason. . . . (4) Industrial injury resulting in absence from work for one or more days.'' This paragraph ends with the statement: ''This is required for our insurance purposes and also for your own protection'' (R. Exh. 45).

b. *Discussion and conclusions*

The sole issue, as alleged in paragraphs 8 and 9 of the complaint in Case 26–CA–13394, is whether Respondent de-

nied Hayes the Good Friday holiday pay because of unlawful reasons, i.e., Hayes' union or concerted activities.

There is no dispute that Respondent's actual policy is that of an employee, on the day before or the day after the paid holiday, misses less that 5 hours of work on such a day or days, holiday pay would nevertheless be paid. This, allowance does not appear in writing but the parties are in agreement that this policy exists. Further, Respondent does not deny that on the Thursday (March 23) prior to the Good Friday holiday, Hayes worked the requisite 5 hours. Therefore, the only remaining issue here is whether Hayes' complete absence on the Monday (March 27) following the Good Friday holiday excluded her from holiday pay or whether Respondent's motive, from all the circumstances, was discriminatory in ultimately deducting the holiday pay from Hayes' paycheck.

In particular, General Counsel argues that Hayes' March 27 absence (the Monday following the Good Friday holiday) should not be counted as an ''absence'' for purposes of the handbook policy because (1) she was absent due to pain resulting from an on-the-job injury and (2) she submitted to Respondent a physician's statement accounting for her absence. (G.C. Br. p. 15.)

General Counsel asserts that Respondent's rejection of the doctor's statement it received from Hayes when she returned on March 30 (G.C. Exh. 30) as insufficient under its rules is frivolous. In support of this argument, General Counsel asserts that no complete diagnosis of Hayes' condition could have been made until a bone scan had been made, and that no bone scan could be made because the Respondent's workmen's compensation carrier had delayed authorization for payment for the bone scan and that the results of the bone scan were not made known because of this delay until after the day in question, i.e., March 27, the day after the holiday (G.C. Br. p. 15). General Counsel further argues that there was no evidence to show that Hayes' claim of backpay was spurious. To the contrary, Respondent knew that Hayes was under medication for her pain. In sum, General Counsel argues there is no rational basis for concluding that Hayes did not suffer pain or concluding that the pain was not attributable to her injury. Thus, General Counsel argues, Respondent acted contrary to its own rules and, in view of Hayes' engagement in known union activities, supported by Respondent's arbitrary failure to apply its own rules, Respondent's deduction of the holiday pay was discriminatorily motivated.

Respondent argues that, in determining the application of the exceptions to the requirements of working the day after the holiday, the company was endeavoring to discover whether there was any medical reason for Hayes to miss work on March 27 and particularly whether it was work-related. Respondent asserts that that was particularly the reason for taxing Hayes with bringing in a doctor's statement showing that, for whatever reason, she had been unable to work on the working day after the Good Friday holiday (R. Br. p. 10). In view of Hayes' failure and refusal to provide such further documentation Respondent asserts that it lawfully applied the rules in deducting the holiday pay; and that, in any event, even if it misapplied the rules, there is no proof that its misapplication of the rules was part of a desire to unlawfully discriminate against Hayes because of her union or concerted activities.

With regard to General Counsel's argument, I do not believe that Respondent's insistence on submission of a medically supported reason for the March 27 absence is ''frivolous.'' On the contrary, all that appears on record is Hayes' claim of pain due to a March 7 work-related injury; her being medicated therefore upon treatment by a physician; and, following a bone scan examination, being directed to return to work without physical limitations (G.C. Exh. 30). On this record, there is no evaluation which shows that Hayes, in fact, had a medical basis for suffering pain; and that omission was further underscored by a back scan examination which also showed no physical basis for the pain.

To the extent General Counsel argues that Hayes' submission of the physician's March 29 statement itself accounted for a March 27 absence, it is without merit. All it shows is that she was in the doctor's office. The face of the document (G.C. Exh. 30) shows that there had been a release of the patient to return to work the very next day without restrictions on her working capacity. Pain, due to motion, would have been such a restriction.

There was no such restriction.

To the extent General Counsel concludes that there is no rational basis for concluding that Hayes did not suffer pain, he is mistaken. The doctor's report of March 9 makes no suggestion of the existence of a restriction of motion or other conclusion which would show the existence of pain much less that it was attributable to a work-related injury.

The real question which must be answered is whether Respondent could lawfully insist on a written doctor's statement which would show that Hayes' March 27 absence was due to either a work-related injury or some other disability which would medically justify her absence. As late as April 1989, it gave her the opportunity to do so but she failed to do so. All that Respondent had in its possession with regard to medically supported conclusions of Hayes' condition was a March 10 status report from Dr. Engelberg stating that Hayes could ''return to full duties immediately with no restrictions'' (R. Exh. 44) and a March 29 release from Dr. Engelberg showing that she could return to work the next day, on March 30, without limitations even after the bone scan (G.C. Exh. 30). Under these conditions, Respondent could reasonably feel suspicious that, whether or not Hayes might be malingering, she had failed to meet the exception: absence due to a work-related injury; absence with a doctor's certificate verifying employee's illness.

On the other hand, I was not much impressed with Respondent's continued insistence that, in determining whether Hayes qualified for an exception to its absence policy, it could insist on a written doctor's release to return to work because of an industrial injury resulting in absence of one or more days (R. Exh. 45). That provision, as the section itself notes, is for Respondent's insurance purposes and for the employee's protection. In short, that paragraph in Respondent's employee handbook is designed to protect the employer against risks in returning an employee to work when the employee has been injured, in particular, for an industrial injury serious enough to cause absence for one or more days. It is designed, by gaining the physician's release, to protect the employer from an employee's premature return to work rather than, as here, as a vehicle by which the employer may insist on the employee returning to work on pain of losing a day of holiday pay.

I conclude, in sum, that whether Respondent precisely applied the rules in its handbook to the Hayes case, its actions, it seems to me, were insufficient to support a conclusion that its motives were unlawful. I reach this conclusion on the facts notwithstanding that Ernestine Hayes did engage in union activities and, indeed, as on the negotiating committee; she was not alone in those activities. There is no evidence that, as part of General Counsel's case in chief, Respondent singled out or identified Hayes in any manner prior to this occurrence for her union activities or that its treatment of Hayes was in some way disparate. To the contrary, the evidence shows that Respondent has, in other circumstances, denied holiday pay to persons missing the day before or day after under its rules. The fact that in none of these instances of deductions of holiday pay were the employees suffering from work-related injuries seems to me to be irrelevant. Thus, there is no unique or disparate treatment of Hayes. In addition, there was consistently no medical evidence to support Hayes' claim of pain. The fact that she was claiming pain does not establish the pain nor does her taking medication (undistinguished on this record) establish that she was suffering from pain or that the injury was work related. In any event, and notwithstanding the existence of a weak prima facie case, Respondent sufficiently rebutted any such prima facie case, *NKC of America*, 291 NLRB 683 (1988), by having in its possession written medical evidence which failed to support the existence of a work-related injury or, more important, the existence of pain. In any case, Respondent here would have acted the same regardless of the prima facie case. Ibid. In the light of these circumstances, I shall recommend to the Board that the General Counsel has insufficiently proved that the deduction of Good Friday holiday pay from the paycheck of Ernestine Hayes violated Section 8(a)(1) and (3) of the Act and that allegations thereof be dismissed.

17. Alleged violation of Section 8(a)(3): the July 1, 1989 verbal warning to Josephine Benson

The complaint alleges that on or about July 18, 1989, Respondent issued a verbal warning to Josephine Benson for unlawful motives in violation of Section 8(a)(1) and (3) of the Act.

I have already found, above, that Respondent, in violation of Section 8(a)(3) and (1) of the Act, paid unlawful attention to Josephine Benson in issuing an unlawful written warning to her on November 15, and on November 22, 1988, unlawfully suspending her. The matters alleged in the new complaint occurred 8 months thereafter in July 1989. I conclude, on the basis of the above findings, that Respondent was possessed of unlawful animus against Josephine Benson and, of course, had knowledge of and resented her activities on behalf of the Charging Party. The supervisor, at all material times, was Plant Manager Bill White.

At about 9 a.m., July 17, 1989, Benson went to the restroom. She testified that she remained there approximately 13 minutes because she was ''sick'' (Tr. 2212). When she came out, she saw Bill White sitting in a chair apparently near the doorway to the restroom and White told her: ''No wonder you can't make any money because you stay in the restroom too long'' (Tr. 2212). White looked at his watch when saying this. White told her that he was going to give her a warning and said nothing else at that time.

About 30 to 35 minutes later, while she was at her work station, White was working at a table loading goods, situated immediately next to Benson's workplace. She asked him if he was really going to give her a warning and he said that he was.

At about 2:15, later that same day, three employees, including Benson, entered White's office to discuss with him the method by which he computed their production (Tr. 2214–2215). While in the room, White told her that she could not make any money because she stayed in the restroom for 18 minutes (Tr. 2215).

Benson denied that she did and could recall nothing further in the conversation. Benson denied that, while she was in the restroom, any employee came into the restroom and told her that Bill White wanted her to leave the restroom; nor did White ever tell her that he had sent someone in to tell her to come out (Tr. 2216). He did not tell her (at the time of giving her the warning) that he was giving her the warning because she refused to come out when he had told somebody to tell her to come out. He never showed her a written document showing that she was receiving a warning. Although she knew that an employee, Gwendolyn Crawford, worked for the Company at the time of this warning from Bill White, she denied that Crawford ever came into the restroom and told her that White wanted her to come outside (Tr. 2217–2218). She also denied a recollection of whether Gwendolyn Crawford came into the restroom that day (Tr. 2218). Further, Benson testified that she knew of employees who had been in the restroom for as long as 25 minutes because of sickness and when the employee had been summoned to come out by White, merely told the summoning employee to tell White that she was sick (Tr. 2218). In particular, Benson testified that a coemployee told her, on that day, while Benson was in the bathroom that this other employee (Thompson) had been in the bathroom for 25 minutes that morning (Tr. 2222). At no time however, did she ever tell Supervisor White that she was sick nor did White ever ask her whether she was sick. Benson testified that she never told White that she was sick in the bathroom because White ''never gave me a chance. All he was throwing at me was warnings.''

Lastly, Benson testified that on the prior day, July 17, Benson in the company of other employees wanted to know how White was computing their production which is the basis for establishing their incentive pay rate. When they went in to discover the method of his calculations, he told them that he was not going to show them how he performed this function (Tr. 2227) but he thereafter did show her how to do it. On the next day, July 18, they did the same thing. When they asked him for production records, he refused to supply them.

Plant Manager White admitted that he told Benson that she was going to receive an oral warning for staying too long in the restroom and that he placed a written notice in her personnel file stating that she had been orally warned (Tr. 2113). White testified in the past he has orally warned employees for staying too long in the restroom but had never placed any such notice in any employee's file (Tr. 2116). He said the reason he made a written notation of the verbal warning was that, unlike other employees, Josephine Benson failed to come out of the bathroom after he had sent in an employee to tell her to come out (Tr. 2116).

Consistent with White's testimony, Gwendolyn Crawford testified that although she could not recall the date, she recalled the event.

She had been in the restroom and had recognized Josephine Benson's voice because she had been talking to her when she was using the bathroom herself (Tr. 2450–2451). Crawford, leaving the bathroom and returning to her work station walked into Supervisor White. White asked her to go back into the bathroom and tell Benson to come out (Tr. 2452). She did so. In addressing the closed booth in which Josephine Benson apparently resided, she said: ''Josephine, Bill wants you come out of the bathroom'' (Tr. 2456, 2459). Crawford testified that he stood at the bathroom door when she told Benson to come out; that there was no reply; and that she turned and exited the door (Tr. 2456, 2459). Her position at the door (from which she made the request for Benson to come out) was about 15 feet from the closed stall in which Benson resided (Tr. 2461). As above noted, Benson denied having heard anyone tell her to come out.

White testified that Benson did not come out and had remained in the bathroom about 18 minutes (Tr. 2117). White said that when he asked Benson why she had not come out when he had sent Crawford to tell her to come out, Benson merely shrugged her shoulders and said nothing (Tr. 2117). He admitted that there was no formal, written policy with respect to how long an employee was permitted to stay in the restroom (Tr. 2118). On the other hand he said that he had never had the experience of an employee remaining in the bathroom after he had requested her to come out (Tr. 2118). He testified that he had sent in after many of them who were in the bathroom. The only reason that he wrote up the verbal warning was that Benson did not come out immediately but remained in the bathroom for 5 minutes after he had requested her to come out (Tr. 2119). When Benson emerged, he told her immediately that he was going to write her up because she stayed in the bathroom too long and because she did not come out for 5 minutes after she was summoned.

Discussion and Conclusions

Having already found that Benson had been subjected to unlawful conduct with regard to a warning and suspension, I would ordinarily not pass on this verbal warning based on her overstaying her time in the bathroom because it would merely be repetitive. However, since the remedy in this case would involve, inter alia, expunction of each of the alleged unlawful warnings, *Sterling Sugars*, 261 NLRB 472 (1982), I believe it necessary to pass on this alleged unlawful warning as well.

I believe little of Josephine Benson's testimony. I do not believe that she was sick (certainly sufficient to have her remain in the ladies restroom for 18 minutes); I do not believe that she did not hear Gwendolyn Crawford ask her to come out; and I conclude that contrary to the allegations of the complaint, the verbal warning did not violate Section 8(a)(1) and (3) of the Act.

In the first place, there were certain elements of Benson's testimony which struck me as overly argumentative rather than responsive. In response to the question (albeit on cross-examination) whether she told Plant Manager White on the morning of July 18 that she was sick prior to going to the restroom, her response was not that she did not tell White, but that White never asked (Tr. 2222). When asked whether she told White that she had been sick, her response was, at least at first: ''would it do any good? No.'' When she was again asked whether she had told White that she was sick *prior* to going to the bathroom on July 18, she answered, ''No, Mr. White never gave me a chance.'' The response to this question was obviously misconceived since the witness apparently believed the question related to White speaking to her after she emerged from the bathroom rather than before. In any event, she testified that White never gave her a chance to tell him that she was sick. I credit White's contrary testimony that when he confronted her with being in the bathroom for a total of 18 minutes, all she did was shrug her shoulders. My observation of Benson leads me to the conclusion that she would not hesitate in telling him that she was sick if that were true. Rather, I credit White's testimony that she shrugged her shoulders. I was also not impressed by Benson's testimony, that another employee had been in the restroom even longer than herself, as ultimate justification for her conduct.

Secondly, I do not believe Benson's denial of not having Gwendolyn Crawford ask her to come out of the bathroom. Gwendolyn Crawford did not whisper the message to Benson notwithstanding that she was 15 feet away, standing at the entrance to the bathroom door and Benson was in the stall with the door closed. Crawford had been in conversation with Benson immediately before emerging from the bathroom and meeting White. There is no suggestion in my observation of Crawford that she would have whispered the message to Benson. Crawford was not employed by the Company at the time she testified and I credit her as a relatively independent witness whose testimony does not suffer from any self-interest or fear.

Thirdly, I discredit Benson's testimony with regard to this episode because I credit Plant Manager White's testimony that he merely asked her why she had not come out of the bathroom after he had summoned her through Gwendolyn Crawford. Benson's testimony is that White never gave her a chance to explain what she was doing in the bathroom: ''all he was throwing at me was warnings'' (Tr. 2223). White's testimony was that he did ask her why she did not come out when he sent Gwendolyn Crawford in to tell her to come out and that Benson's reply was merely to make a gesture, shrugging her shoulders (Tr. 2117). As I have mentioned before, I conclude that White did ask the question and that, contrary to Benson's testimony, she did not tell him she was sick. Rather she merely shrugged her shoulders. Had Benson been actually ill in any way, I conclude that she would have not hesitated in telling him that.

Lastly, in evaluating White's motive, and notwithstanding any preexisting union animus, the uncontradicted evidence is that he *did* send in Crawford to get Benson out. Thus, even if Benson did not heard Crawford's summons, White would have been reasonably upset by Benson's failure to appear.

Notwithstanding the above findings, there is present, of course, the fact that Benson had received Respondent's unlawful attention 8 months before, and I have found violations of Section 8(a)(1) and (3) in a prior warning and suspension. There is the further problem that Plant Manager White was sitting outside the restroom, timing Benson therein and that at the 13-minute point, when Gwendolyn Crawford emerged, he told her to go in and get Benson to come out (Tr. 2116). The question is why, in the first place, was White sitting

there timing Benson for 13 minutes. One of the inferences to be drawn is because he was setting her up because of her outstanding union activities which he resented. Another was that he resented her questioning him with regard to the method by which he figured out the incentive wage rates for employees on incentive wage rates. On the other hand, however, the testimony is uncontradicted that female employees often remained in the restrooms for long periods and that Plant Manager White often sends messages to them to come out. Thus there appears to be insufficient disparate treatment of Benson based on White's impatience with her for being long in the bathroom. The case is distinguished by Crawford's participation and Benson's conduct thereafter.

In view of my conclusion, in substance, that Benson may well have been, at least for some part of the 13 minutes she was in the bathroom, guilty of minor malingering which White reasonably resented, I conclude that she cannot use, as a shield against this unprotected activity, my having found that Respondent previously paid unlawful attention to her because of her open and notorious union activities.

In short, I conclude that Respondent, considering all the evidence, has proved by a preponderance of the credible evidence that Supervisor White would have written up the verbal warning notwithstanding Benson's engaging in union activities. Thus I conclude that even in the presence of General Counsel having proved a prima facie case of discrimination because of Benson's notorious union activities, Respondent's animus, and Respondent having engaged unlawful activity against her 8 months prior to this time, Respondent effectively produced a preponderance of credible evidence to show that it would have taken the same action regardless of any union or protected activity engaged in by Benson. See *NKC of America*, 291 NLRB 683 fn. 4 (1988). I therefore recommend to the Board that the allegation of violation of Section 8(a)(1) and (3) of the Act by White issuing and memorializing a verbal warning on July 18, 1989, be dismissed.

18. Alleged violations of Section 8(a)(5)

a. *The ''interim agreement on pay rates for initial job offers''*

Paragraph 16 of the complaint in Case 26–CA–13394, alleges three elements of violation:

> (a) In or about June 1989, Respondent implemented a new rate of pay for newly-hired employees at Respondent's Arlington, Tennessee plant.
>
> (b) The above conduct alleged in (a) occurred unilaterally without having reached a valid impasse in negotiations and also constituted acts in bad faith.
>
> (c) The rate of implemented pay as described in paragraph (a), above, exceeded the rate offered by Respondent in negotiations with the Union.

b. *Respondent's refusal to furnish information concerning identities of newly hired employees paid the newly implemented rates of pay; paragraphs 17, 18, and 19*

Paragraph 17 of the complaint in Case 26–CA–13394 alleges that on or about August 25, 1989, the Union requested that Respondent furnish the identities of newly hired employees to whom Respondent paid the newly implemented rates of pay; that such information is necessary for and relevant to the Union's performance of its function as theexclusive collective-bargaining representative of unit employees (complaint par. 18) and that since on or about August 25, 1989, the date of the Union's request, Respondent has failed and refused to furnish the information (complaint par. 19).

The facts are not in substantial dispute.

A. As the General Counsel notes (Br. p. 8) Respondent's final contract proposal for wages is contained in Respondent's erstwhile ''final offer'' dated July 22, 1989. It contains proposed wages both for basic hourly rates and incentive rates (G.C. Exh. 3(h)). In substance, the job classifications of material handlers, cutters, inspectors, chain sewers, and lock sewers all have a hiring rate of $3.40 per hour. Each of those classifications have wage rate increases after 90 days, 6 months, and 1 year. The material handlers 1-year rate is $4 per hour ad the lock sewers' rate after 1 year is $4.40 per hour. The proposal also relates to wages for maintenance trainees.

In negotiations after July 22, Respondent no longer referred to its proposals of July 22 as ''final'' but continued to insist on its July 22 wage proposals in bargaining at all times certainly through January 5, 1989 (Tr. 2233–2235).

A collective-bargaining session was scheduled for January 5, 1989. On the day before, January 4, 1989, Respondent dispatched a letter to the Union (G.C. Exh. 33) in which it stated that it was going to place on the agenda for immediate action an intermediate proposal concerning pay rates for new employees. Respondent, in this letter, stated that it was unable to hire qualified employees for vacancies because its [comparatively low] starting rates. Job applicants, according to Respondent, were willing to work at the maximum rate that the job permitted but would not work at the lower hiring rate. In short, Respondent desired the Union's agreement to having Respondent possess latitude to make job offers above the ordinary starting rate up to the maximum rate. It asserted that the higher starting rate would be offered if the applicant had superior experience or qualifications or perhaps merely because Respondent was faced with a shortage of trainable people in the Arlington, Tennessee area. In the latter case, Respondent, hiring at a higher initial hiring rate, would increase the pay of any existing employees working in the same job title to that of the newly hired, higher paid employee. Respondent asserted that under these conditions, its proposal would have no negative impact on the existing work force (G.C. Exh. 33) since all current employees were paid the highest rate.[25]

[25] The terms of Respondent's proposed ''interim agreement on pay rates for initial job offers'' reads:

> 1. The Company should have the right to offer new employees a starting rate of pay greater than the stated starting rate for the applicable job title, but not to exceed the maximum rate for the job.
>
> 2. In the event the company employs a new employee at greater than the starting rate for his job title, any employee working with the same job title who was being paid at a rate less than that of the new employee would be increased to the new employee's level of pay.
>
> 3. Paragraph 2 shall not apply if the new employee's higher rate of pay is based on their [sic] greater experience or qualifications than that possessed by the previously hired employees.
>
> 4. For purposes of this Article, job titles in current use are Helper, Material Handler, Cutter, Forklift operator, Inspector, Chain Sewer, Lock Sewer, Maintenance Mechanic and Maintenance Trainee.
>
> 5. This Article may be implemented immediately. However, both parties are free to make other proposals on this subject for incorporation into the final complete agreement.

The Union's answer to Respondent's intermediate pay increase proposal at the January 5 bargaining session was that the Company should provide a higher starting rate for all employees and the Union was not going to agree to ''piece meal a contract'' (Tr. 2235–2237).

At the January 17 collective-bargaining session, the Union stated that it wanted a higher starting rate for all employees and would not agree to permit the Company to ''discriminate'' between applicants (G.C. Exh. 35).

At the March 15, 1989 collective-bargaining session, the Union stated that it rejected the company proposal on interim pay. When Respondent asked if that meant that the parties were at impasse on the subject, the Union responded: ''Don't start that crap'' (Tr. 2316). At this and the prior collective-bargaining session Respondent rejected the union proposal for an increase of wages for all employees because an increase for all employees was not ''justified'' (Tr. 2240). The Union's position was not that a differential wage rate would discriminate between applicants and existing employees; rather, it would permit Respondent to discriminate between applicants (Tr. 2242). To solve this problem, the Union proposed a $3.90 wage rate for all newly hired employees, thus effectively raising the wage rate for all employees in that category to at least $3.90 (Tr. 2242). Respondent's position was that an overall wage rate of $3.90 per hour was not justified.

On June 20, 1989, Respondent wrote to the Union with regard to the interim pay rate proposal which would be discussed the next day in collective bargaining (G.C. Exh. 35). Reminding the Union that the March 15 negotiations, the Union had ''flatly'' rejected the interim pay proposal, and asserting that Respondent was contemplating recruiting employees, a priority matter to Respondent, Respondent inquired whether the Union's March 15 rejection stood and invited any counteroffers (G.C. Exh. 35).

At the June 21, 1989 collective-bargaining negotiations, the Union submitted a counterproposal (G.C. Exh. 34) in which it refused accept the interim agreement because of the tendency to ''piecemeal'' the contract which prolonged negotiations and the reaching of agreement on an entire contract. The Union however submitted a counterproposal: that the Union would agree to the interim pay offer to new employees provided the company would agree to the Union's wage proposals during the interim period. The Union's wage proposals outstanding at this time (G.C. Exh. 45) provided for an 80-cent-per-hour across-the-board wage increase to all employees both in the first and second year of the contract: a hire in rate of $4 per hour in the first year and $4.50 per hour in the second year; and postprobation rates of $4.50 per hour in the first year and $5 per hour in the second year. In addition, the Union's wage proposal had a *cola* of 10 cents per hour for every 3-percent increase in the cost-of-living index (G.C. Exh. 45). Respondent rejected the Union's counterproposal on wage increases (Tr. 2320–2321) and asserts that impasse existed as of June 21, 1989 (R. Br. p. 13).

With both Respondent and the Union remaining fixed in their respective positions with regard to the interim wage increase, Respondent, sometime later in June 1989, commenced implementing hiring apparently at the new interim wage rate, thus implementing its offer (Tr. 2247).

19. Alleged violation of Section 8(a)(5); Respondent's refusal furnish information concerning identities of newly hired employees paid the newly implemented rates of pay

B. The Respondent concedes (R. Br. p. 15) and the evidence shows (Tr. 2250) that at a collective-bargaining session of August 25, 1989, the Union inquired whether Respondent, in fact, had hired employees at a rate above $3.40 and Respondent told the Union that it had done so. There is no dispute that the classifications covered by the newly implemented wages are classifications for which the Union is exclusive bargaining representative.

Meanwhile, on August 15, 1989, the Union had already filed a charge in Case 26–CA–13356 alleging, inter alia, the unlawful unilateral hiring at a higher wage rate than Respondent would agree to in bargaining for a contract together with a refusal to furnish ''certain bargaining information'' (R. Exh. 43).

At the August 25 collective-bargaining session, the Union asked for a list of employees hired at the newly implemented interim wage rates and Respondent refused to furnish the list because of the pending unfair labor practice charge (Tr. 2252). In fact, Respondent's August notification to the Union for such hiring was the first time that it had given such notice to the Union (Tr. 2252–2253).

Respondent asserts that it is under no duty to furnish the requested information because the information is merely to support the Union's unfair labor practice charge. Consistent with this position, Respondent cites *American Oil Co.*, 171 NLRB 1180 (1968); *General Electric Co.*, 163 NLRB 198 (1967); and *Huck Mfg. Co.*, 254 NLRB 755 (1981).

Discussion and Conclusions

1. To the extent that the request for information related employees, newly hired into unit classifications, the information does not pertain to nonunit information but to information regarding the wage rates of unit employees. On such a basis, the information is clearly relevant. Compare: *Soule Glass Co. v. NLRB*, 652 F.2d 1055 (1st Cir. 1981), with *NLRB v. Western Electric*, 559 F.2d 1131 (8th Cir. 1977). The request for information concerning the wages of employees already hired in the bargaining unit is presumptively relevant to bargainable issues, of which the refusal to disclose violates Section 8(a)(5). *Soule Glass Co. v. NLRB*, supra, citing *NLRB v. Rockwell-Standard Corp.*, 410 F.2d 953, 957 (6th Cir. 1969).

The cases, cited above by Respondent, demonstrating that there is no obligation to furnish information to the Union because the information requested is the subject of an unfair labor practice charge, are clearly distinguishable. The information requested in those cases related principally to unfair labor practices in matters outside of the area of actual bargaining issues. In *Huck Mfg. Co.*, supra at 755, the Union sought information regarding the discharge of an employee whose termination had become the subject of an unfair labor practice charge. The administrative law judge, affirmed by the Board, held that the employee was not required to give the information to the Union because the information sought was pertinent to the charge *and not to the bargaining*. In *American Oil Co.*, 171 NLRB 1180 (1968), the judge, with Board approval, found that the Union's demand for certain

payroll record information, ostensibly in order to discharge its function as bargaining agent in the formulation of union contract demands, was actually pretextual. The bargaining negotiations were not only to commence 3 months later, but the records were actually sought to support a violation allegedly based on unlawful subcontracting. The administrative law judge was careful to note, 171 NLRB at 1188 fn. 46 therein, that such information might be called for in the fulfillment of *actual bargaining obligations*.

In the instant case, the collective-bargaining with relation to wage rates was ongoing; the material was clearly relevant to the wage rates of employees actually now employed in the unit over which the Union was the exclusive bargaining representative; Respondent was justifying the higher wage rate to the newly hired employees based on their superior qualifications or experience; the names of the newly hired employees was therefore clearly relevant to both the Union's exploration of this issue of unit employee wage rates and relevant to the Union's 9(a) bargaining status and its 8(d) obligation. The fact that the Union filed the 8(a)(5) charge first and then made its request for the information may not be the best mode of proceeding, *American Oil Co.*, 171 NLRB 1180, 1188 (1968), but I find that the filing of the charge, in this particular case and under these particular circumstances, does not provide a defense for Respondent's refusal to provide the information. No further showing of relevance of this presumptively relevant material need be shown, *Soule Glass Glazing Co. v. NLRB*, citing *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61, 69 (3d Cir. 1965).

I therefore conclude that Respondent's failure to provide the information to the Union, commencing on or about August 25, 1989, violates Section 8(a)(5) and (1) of the Act, as alleged. I further conclude that, under the circumstances of this case, Respondent may not assert that it lawfully implemented the interim wage rates.

2. I have found, above, that Respondent engaged in surface bargaining. The Board and courts have noted that Section 8(d) of the Act imposes a duty on employees to bargain collectively in good faith on pain of violating Section 8(a)(5). At the same time, the Act expressly provides that the duty to bargain in good faith does not compel either party to agree to a proposal or make a concession. *Huck Mfg. Co.*, supra, citing *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952). In resolving the ''obviously significant tension between these provisions.'' *Huck Mfg. Co.*, supra, I have found that Respondent's unfair labor practices and bargaining positions demonstrated surface bargaining. Cf. *L. W. Le Fort Co.*, 290 NLRB 344 (1989). In addition, was influenced principally by President Langston's preelection statements, which foretold, in my judgment, quite accurately, the subsequent course of bargaining. Cf. *Port Plastics*, 279 NLRB 362 (1986). This course of bargaining was that the collective bargaining would be conducted so as to result in no agreement or in an agreement solely on Respondent's terms, for all practical purposes ignoring the existence of the Union. Respondent's implementation of its interim wage proposal further demonstrates Respondent's bargaining posture.

In passing, it might be noted that the basis of Respondent's January 5, 1989 request for the interim wage rate was a need for ''immediate action'' (G.C. Exh. 3). On June 20, 1989, it had become a ''priority matter'' (G.C. Exh. 35). The Union had rejected the proposal in March. Whether there was a business necessity insufficient to piecemeal the contract is thus not beyond question. Unilateral implementation of interim wage rates following interim impasse obviates the need for contract bargaining and is a suspicious circumstance on the issue of good faith.

Suspicious circumstances notwithstanding, and quite aside from evidence of Respondent's surface and bad-faith bargaining in other instances, in the present situation, one need not pass on the questions of ''impasse'' or the ''piecemeal'' nature of the bargaining.

In the first place, as General Counsel observes (G.C. Br. 18), absent the Union's *consent*, Respondent's unilateral implementation of an interim wage scale whereby it is *sole arbiter* of paying newly hired applicants (for unit jobs) higher wages than its contract offer, which Respondent deems warranted under market conditions, unlawfully arrogates to Respondent a unilateral right which the statute prohibits absent consent. Such an implemented proposal directly violates Section 8(a)(5) and (1). *NLRB v. A-1 King Size Sandwiches*, 732 F.2d 872 (11th Cir. 1984).

Respondent asserts that its interim wage offer to unit employees is justified because of a perhaps temporary inability to hire qualified employees. If it pays these higher wages to some new, unit employees (for whom the Union is the statutory bargaining agent), it will justify *not* paying these higher rates to *other* of these unit employees on the ground that the former unit employees have better qualifications or skills; otherwise, it agrees to pay all existing unit employees the higher interim rates if it merely hires the new employees because of an employee shortage. In the face of this position, Respondent—having admitted in August 1989 that it implemented the interim rates and hired new unit employees in those rates—refuses to give the names of the new unit employees to the Union because of the unfair labor practice charge. Having rejected the legal basis for Respondent's refusal, I further find that Respondent's refusal to give the names of the employees directly prevents the Union from inquiring whether the conditions Respondent prescribed for paying higher wages actually exist. Thus, although Respondent's proposal for the right to pay increased interim unit wage rates was bottomed on its assurance that they would be paid to applicants with superior skills or qualifications or, alternatively, if ordinary applicants are hired at the higher rates, to all unit employees in those classifications, Respondent's refusal to give the names of the new-hires prevents the Union from inquiring into and contesting the ''superior qualifications.'' The resulting ignorance imposed on the Union ipso facto permits Respondent to discriminate among applicants and to hire *any* new unit employees at the higher rates without having to pay other new unit employees at the higher rates because it need not substantiate the superior skills or qualifications for the new hires. It won't give the names to the Union so that the Union might inquire into the new-hires' qualification.

While I would ordinarily view the alleged 8(a)(5) allegation discretely, the question of the lawfulness of interim wage rate implementation separate from the issue of Respondent's failure to give the requested information to the Union, I conclude, on the basis of Respondent's union animus and other bargaining positions, that the subsequent unlawful refusal to give the new-hires' names to the Union colors the motive for the prior implementation. Viewed as a

common issue, I conclude that, under the cloak of collective bargaining, the implementation gives Respondent unilateral control over unit wages by the refusal to give the Union the very information on which Respondent's need for interim wage relief was predicated.[26] Unilateral control over wages, whether by bargaining demand or as a result of Respondent's unlawful tactics vitiates the Union's statutory right under Section 8(d) to participate in good-faith bargaining on wages and violates Section 8(a)(5) and (1) of the Act. *NLRB v. A-1 King Size Sandwiches*, supra; *Colorado-Ute Electric Assn.*, 295 NLRB 607 (1989).

Quite apart from the above grounds for determining the existence of bad-faith bargaining, further inquiry allows an alternative basis to conclude that Respondent's implementation of the interim wage rates unlawfully arrogated the establishment of the interim wage rates into Respondent's control. If the instant implementation were deemed lawful, then on a subsequent otherwise lawful impasse permitting Respondent's unilateral implementation of its proposed wage rate, it would be obligated ''to institute those wage rates last offered the Union as a good-faith basis for settlement,'' *Brooks, Inc.*, 228 NLRB 1365, 1368 fn. 16 (1977). Since the higher interim rates are in effect for an undetermined and undeterminable number of new unit hires, would Respondent then be able to institute (if labor market conditions permitted) its outstanding, lower wage, July 22 contract wage offer (R. Br. p. 14). Was that the ''last offer'' or have the interim wage scales superceded the contract offer?

Is any change justified if it has been previously offered to the Union in collective bargaining? *Richmond Recording Corp. v. NLRB*, 836 F.2d 289 (7th Cir. 1987), citing *Huck Mfg. Co. v. NLRB*, supra at 1186. Respondent's implementation, as above noted, violates Section 8(a)(5) and (1) of the Act. Respondent's refusal to give the names of the new hires also violates Section 8(a)(5) and (1) of the Act, as alleged.

20. Alleged violation of Section 8(a)(5): failure to provide information concerning substance abuse program

On April 26, 1988, in contract negotiations, Respondent submitted, as part of ''corporate policy'' a substance abuse proposal (Tr. 2260; G.C. Exh. 38).[27] Aside from prohibiting on-the-job possession of use of narcotics and alcohol, and providing for discipline in violation of that prohibition, it also provided for discipline, including discharge, for off-the-job illegal drug use. By its terms, it specifically applied to employees ''on Company property.'' In addition, Respondent's proposal mandated employee report to his supervisor of employee treatment for a controlled substance. Furthermore, the proposal grants Respondent the right to require an employee to submit to ''standard alcohol and drug screening test'' in the case of an on-the-job accident or observed behavior, or the receipt of information substantiating drug or alcohol abuse. The presence of alcohol or drugs as a result of such screening test permits discipline.

In a collective-bargaining session of April 26, 1988, the date of submission of the proposal, Respondent told the Union that the policy of the substance abuse program had been implemented at the Arlington plant prior to the November NLRB election (Tr. 2346). Respondent was unclear whether a notice was ever posted at the Arlington plant advising the employees of implementation (Tr. 2346–2347) but it was certain that the substance abuse plan had never been enforced (Tr. 2347).

In the next discussion of the substance abuse proposal on November 16, 1988 (Tr. 2349), Union President Rudd told Respondent that Respondent's employees at its Memphis and West Memphis plants had never heard of a substance abuse policy. The Union objected to the substance abuse policy because it violated the ''absolute right of a worker . . . or violated constitutional rights of a worker'' (Tr. 2349). When Respondent told the Union that the proposal was constitutional, the Union nevertheless then objected because it gave Respondent the ''absolute right to force a worker to take a drug test without cause'' (Tr. 2350).

On several occasions in 1988, the Union told Respondent, in forceful terms, that it rejected the substance abuse proposal. The Union counteroffered to implement the proposal only for newly hired employees (Tr. 2263). Respondent refused this counteroffer made in August 1989 (Tr. 2263).

At a bargaining session of August 7, 1989, the Union requested information concerning the substance abuse policies in effect at Respondent's plants other than the Arlington plant (Tr. 2264). Respondent said that it did not believe it had an obligation to furnish such information about nonbargaining unit employees but that it would research the matter and respond. Before it could respond, the Union put the matter formally in writing (G.C. Exh. 37) in a letter of August 9, 1989. Noting that Respondent's bargainer, Ron Wargo, stated that he was in charge of personnel and labor relations at Langston's plants in Tennessee, Arkansas, and Louisiana, and since Respondent desired power of ''unlimited search and seizure . . . at its unionized plant in Arlington, Tennessee.'' the Union requested answers to the following questions:

> A. Does these policies [sic] exist in the Company's non-union plants, and are they being enforced? If so, the Union request copies of such policies and proof of enforcement.
>
> B. If these policies do not exist in the non-union Langston plants that Wargo is in charge of personnel and labor relations, the same as he is at the Langston unionized plant, please explain in details [sic] why these policies have not been implemented and enforced in those plants, since there is no apparent law to prevent the company from doing so?
>
> C. Without proof that these policies exist, and are being enforced at the non-union facilities, the Union must assume that no such policies exist, and therefore

[26] It is thus unnecessary to inquire whether Respondent's implementation would ever have met the rule in the Fifth Circuit, for instance, that overall impasse is not a requisite for implementation of a change in a mandatory subject, merely that the Union be informed of the proposed change and be given a reasonable opportunity for counterarguments or proposals. *Huck Mfg. Co. v. NLRB*, supra at fn. 15.

[27] The proposal, submitted April 26, 1988, appears to have been thereafter discussed with the Union on June 21, 1988, November 16, 1988, and August 7, 1989 (G.C. Exh. 38, Tr. 2349).

The Respondent's proposal prohibits drugs both on the job ''or on Company property, and prohibits alcohol (or being under the influence) ''while on the job or on company property, or while conducting company business.'' (G.C. Exh. 38, par. 1). The proposal is accompanied by an employee consent form, authorizing medical testing for drugs and alcohol. Failure to execute the form authorizes discipline, including discharge, constitutes a violation of Respondent's ''corporate policy''(G.C. Exh. 38, ''Consent and Release Form'').

> we have no other choice but to request and expect a detailed explanation of why these policies are being pushed at the Arlington, Tennessee plant only?

In response, Respondent's August 21, 1989 letter to the Union (G.C. Exh. 36) states:

> Such information is presumptively not relevant to any legitimate collective-bargaining purpose the Union has with the Arlington plant bargaining unit. Absent a showing of how this information is relevant to the Union's collective-bargaining duty, and specifically why you want this information, the Company declines to provide it.

Discussion and Conclusions

The complaint fails to allege that the implementation of the substance abuse program violates Section 8(a)(5) and (1) of the Act. In view of the absence of an allegation addressed to this issue, I need not pass on it.

There is no doubt, nevertheless, that on April 26, 1988, the date of the Respondent submitting the substance abuse proposal, it *told* the Union that the policy with respect thereto had been *implemented* at the Arlington plant prior to the election (Tr. 2346). If this be true, notwithstanding the confusion of Respondent being unable to accurately advise the Union of the truth of this assertion thereafter, the Union had reason to believe, clearly on this record, that the policy of the substance abuse proposal had been implemented and thus was a term and condition of employment of current employees in the unit.

By November 1988, the Union had apparently made inquiry as to the existence of the substance abuse program at Respondent's other plants and had been told that there was no such policy in effect at those nonunionized plants.

In view of common labor relations direction at Respondent's several plants, and in view of Respondent's assertion that the plan was already in effect at Arlington but the Union had apparently discovered that the policy was not in effect at the nonunion plants, it would appear to me to be relevant for the Union to request information considering its own bargaining position with respect to an alleged existing term and condition of employment covering Arlington plant unit employees notwithstanding that the requested information concerns Respondent's substance abuse policies at its other, nonunionized plants.

Various legal propositions in *Soule Glass Co. v. NLRB*, 652 F.2d 1055 (1st Cir. 1981), are instructive on the instant facts. As noted therein, an employer may treat differently union and nonunion employees or employees in different bargaining units where a legitimate business justification is shown for such action, and absent evidence of bad-faith or antiunion motive. Thus, with regard to 8(a)(3) discrimination (we are here dealing only with Section 8(a)(5) and good-faith bargaining), disparate treatment of employees in different units does not necessarily imply unlawful discrimination. Thus, in a context of good-faith bargaining, a grant of a wage increase to nonunion employees in a different unit who worked through a strike, withholding the increase to unionized employees, did not violate Section 8(a)(3) of the Act.

In addition, Respondent is correct in arguing that where, as here, the Union is seeking information regarding Respondent's substance and alcohol abuse policies at Respondent's nonunionized plants (G.C. Exh. 37), it must show special relevance to the Union's bargaining responsibility at Arlington where it represents and bargains for the unit employees. It does not represent Respondent's Memphis employees or those in Louisiana or Mississippi or Arkansas. For, as stated in *Soule Glass Co.*, supra at 1092:

> The general rule is that an employer must supply, on request, ''relevant information'' ''in the employer's possession'' ''needed by a labor union for the proper performance of its duties as the employees' bargaining representative.'' *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); i.e., ''to enable the [union] to understand and intelligently discuss the issues raised in bargaining. . . .'' *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863, 866 (9th Cir. 1977). See R. Gorman [Labor Law], *supra* at 409. Absent special circumstances, see *Western Massachusetts Electric Co. v. NLRB*, 589 F.2d 42, 47 (1st Cir. 1978), ''relevance'' is determinative of the duty to disclose. Relevance is to be determined by a liberal ''discovery-type standard.'' *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967). As the Supreme Court noted the leading case of *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149, 153–54 (1956), ''[e]ach case must turn on its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met.''
>
> Where the requested information concerns wages and related information for employees in the bargaining unit the information is presumptively relevant to bargainable issues.'' *NLRB v. Rockwell-Standard Corp.*, 410 F.2d 953, 957 (6th Cir. 1969). The union need make no showing of relevance. *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61, 69 (3d Cir. 1965). See *Boston Herald-Traveler Corp. v. NLRB*, 223 F.2d 58, 63 (1st Cir. 1955) (disclosure required ''without regard to its immediate relationship to the negotiation or administration of the collective bargaining agreement'').
>
> ''[W]here the request is for information concerning employees outside the bargaining unit, the Union must show that the requested information is relevant to bargainable issues.'' *Rockwell-Standard, sura*, 410 F.2d at 957 (emphasis added). . . . To meet its burden regarding such information, the Union must show more than ''an abstract, potential relevance'' or ''mere suspicion or surmise.'' Id. at 868. It must show ''by reference to the circumstances of the case . . . more precisely the relevance of the data it desires.'' *Curtiss-Wright*, 347 F.2d at 69.
>
> However, where the employer, during bargaining, puts in issue information not presumptively relevant, the employer must produce data to substantiate its claims. As the Court stated in *Truitt Manufacturing, supra*, ''[g]ood-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. . . . If such an argument [inability to afford wage increases] is important enough to present, in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy.'' 351 U.S. at 152–53. In *Teleprompter Corp. v. NLRB*, 570 F.2d

4, 9 (1st Cir. 1977), this court held, ''[w]hen the employer itself puts profitability in contention—as by asserting an inability to pay an increase in wages—information to substantiate the employer's position has to be disclosed.'' We further stated that ''[t]he employer may not limit the relevant information disclosed to just those fragments which satisfy its own view of the issue,'' and rejected a mootness argument against enforcement of the Board's order. Id. at 11. See *Western Massachusetts Electric Co. v. NLRB*, 573 F.2d 101, 106–07 (1st Cir. 1978) (where company cited economics as reason for using subcontractor rather than unit employees, company put subcontractor costs in contention and must substantiate its cost assertions).

Applying the above legal principles to the instant facts Respondent here, in its April 26 submission of the drug/alcohol program proposal stated (G.C. Exh. 38) that its proposal was ''corporate policy'' and bound unit employees both off the job and ''on Company property.'' Such statements, it seems to me, necessarily implicate a corporatewide policy and expand the geographical reach of the disciplinary program, inter alia, to Respondent's other plants (''on Company property''). Whatever the relevance of a union demand for nonunit information, concerning whether Respondent was implementing the program at its other plants, had Respondent *not* put in play the issues of the program being a ''corporate policy'' applicable ''on Company property,'' it may not be heard to argue ''not presumptively relevant'' when Respondent itself brought the issue into the bargaining arena. Under the *Soule Glass* citation of *Truitt Mfg. Co. v. NLRB*, supra at 152–153, *Teleprompter Corp. v. NLRB*, 570 F.2d 4, 9 (1st Cir. 1977), and *Western Massachusetts Electric Co. v. NLRB*, 573 F.2d 101, 106–107 (1st Cir. 1978), here, Respondent has asserted the existence of a corporatewide policy applicable ''on Company property'' and, having itself put the matters in contention, it may not refuse to give the Union answers if its assertions were ''honest claims.'' If these were ''honest claims'' and ''important enough to present, in the give and take of bargaining, it is important enough to require some sort of proof of [their] accuracy,'' *Truitt Mfg. Co.*, supra, 351 U.S. at 152–153. Where Respondent places the matter in issue, the Union is absolved from hearing the burden of showing special relevance.

Furthermore, the Union showed more than an ''abstract, potential relevance'' or ''mere suspicion or surmise,'' *Soule Glass*, supra, citing *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61, 69 (3d Cir. 1965). In response to Respondent's assertions, above, it told Respondent, as late as the November 16, 1988 bargaining, that Respondent's employees at its West Memphis and Memphis plants never heard of a substance abuse policy (Tr. 2349). Respondent admitted the conversation and failed to meet it. Thus, assuming, arguendo, that the Union was required to support some burden of relevance, it has done so. With the Respondent's assertions and the Union's showing, the Union was entitled to know if Respondent's proposal was advanced in good faith or was hereby another example of bad-faith bargaining.

I conclude that the principle of *Truitt Mfg. Co. v. NLRB*, supra, in any case, applies to the instant facts; that Respondent, having raised the issues of the corporatewide application of the program and its applicability at its other plants (''on Company property''), and the Union having prima facie discovered the untruthfulness of Respondent's assertions of a corporate policy and, in any case, having supported whatever remaining burden it had to show ''special relevance'' for this nonunit information Respondent was obliged to answer the Union's questions as they appear, above (G.C. Exh. 37). Its failure to have done so violates Section 8(a)(1) and (5) as alleged.

21. Alleged violation of Section 8(a)(5): Respondent's unilateral suspension of negotiations on October 9, 1989

The complaint alleges (par. 22(b)) and Respondent does not deny, that on October 9, 1989, Respondent unilaterally suspended negotiations with the Union and since that time has failed and refused to meet and bargain with the Union. Respondent, admitting the allegations of the complaint, asserts that the record shows that there have been 20 months of negotiations resulting in no agreement. Furthermore, the Union's conduct in the negotiations, according to Respondent, deteriorated to ''mere name-calling and posturing about unfair labor practice charges'' (R. Br. p. 19). Respondent asserts, that continuation of negotiations under these circumstances was unlikely to produce an agreement and the Company's suspension of participation was ''reasonable.''

The facts are not at issue. The final collective-bargaining session between the parties was August 25, 1989. At that session Respondent rejected the Union's modification to its wage proposal and the parties adhered to their respective wage positions. Respondent informed the Union at the beginning of the meeting that it had no further concessions to make on 12 important substantive provisions: union dues collection, no-strike clause, visitation, management rights, hours of work, meal and rest periods, wage rates and job standards, holidays, discipline and discharge, temporary job assignments, seniority and job vacancies, and insurance and vacations. As above noted, the Union, at this meeting, inquired whether the Respondent had hired new employees at rates above $3.40 per hour and Respondent replied that it had, putting into effect its January 5 proposal regarding rates for newly hired employees on a temporary or interim basis.

While the August 25 collective-bargaining session started at about 9:l5 in the morning, by about 1 p.m., after a lunchbreak, the Union requested a list of all further subjects Respondent desired to discuss. Scruggs, for Respondent, said that he did not have such a list but with regard to the subject of ''layoff and recall,'' that was one of the bargaining subjects that Respondent ''may have some movement on'' (Tr. 2389). In subsequent bargaining, at that session, on the Union's proposal on ''layoff and recall,'' the parties reached agreement on paragraph 1. On the second paragraph of the Union's proposal, Respondent offered a counterproposal but the parties did not reach agreement on that second paragraph. While the Union rejected the Respondent's subsequent counterproposals on later paragraphs, the Union told Respondent that it would consider and respond to the counteroffers (Tr. 2392). Certain further paragraphs (pars. 7–10) of the proposal were agreed to by Respondent (Tr. 2395). While the parties did not sign off on the agreed paragraphs, Respondent regarded the positions of the parties as manifesting ''no disagreement'' (Tr. 2396). In short, Respondent conceded that there had been progress in bargaining at least on some ele-

ments of the Union's layoff and recall proposal (Tr. 2397). Respondent considered this subject an important matter (Tr. 2397). Respondent asserts, however, that the parties remained far apart and that the progress had been ''imperceptible (Tr. 2398). In any event, nothing happened at the August 25, 1989 bargaining session which precipitated Respondent into believing that no further progress could be made (Tr. 2398–2399). In fact, at the end of the meeting, the parties agreed to confer the following week about the next bargaining session (Tr. 2429).

On October 9, 1989, Respondent addressed a letter to the Union (G.C. Exh. 39):

> At our last bargaining session, I advised the Union that the Company had no further movement to make on all but a few of the proposals then on the table. After careful consideration of the remainder, we are of the opinion that we currently have no further concessions to make on the others as well. After over 20 months of negotiations, and in excess of 30 sessions surely the Union has made similar determinations on at least some of the items on which agreement has not been reached. I would request the Union to advise us of its final position on any articles on which the union has determined that its proposal on the table is in fact, its final position on that subject.
>
> It also has become apparent that the bitterness surrounding the residential picketing and related litigation, coupled with the well entrenched positions of the parties on a large number of articles, has made progress at the negotiating table imperceptible. In fact, the general conduct of the Union committee in recent sessions has been essentially counter productive—characterized by name calling and arguments over whether or not the Union can ''accept'' selective portions of the handbook and other things the company has not proposed
>
> It appears to me that the outcome of pending unfair labor practice charges and other litigation may do more to change the positions of the parties than any amount a meeting could do. In an effort not to further exacerbate the existing situation, the Company is suspending its participation in contract negotiation meetings to permit a ''cooling off period'' pending the conclusion of the outstanding charges. We will continue to negotiate with the Union over any changes from past practice that may be necessary or advisable.

The evidence is uncontradicted that at meetings other than on August 7 and 25, 1989, where the meetings took place in enclosed quarters with perhaps inadequate air conditioning, Respondent's bargaining team consisted of two or three persons whereas the Union's bargainers included a committee of employees sometimes numbering well over a dozen.

On more than one occasion, when Respondent's bargainers objected to the union bargainers smoking in the enclosed area of the bargaining room, this precipitated all members of the union bargaining committee into lighting up cigarettes, asserting that Respondent could not dictate when and where the union bargainers could smoke. Respondent, however, never threatened to suspend bargaining or to actually suspend bargaining pending resolution of the smoking problem but merely asserted that it desired first and foremost to work around such problems and to negotiate the contract (Tr. 2364). In other bargaining, there was vulgar language used and sometimes loud behavior on the part of the union committee (Tr. 2363). Respondent, in sum, conceded that it did not suspend bargaining over any one item. Rather, it stated that it had become apparent to Respondent that the Union ''wasn't negotiating'' (Tr. 2364).

Discussion and Conclusions

At the August 25, 1989 collective-bargaining session, the parties had made some progress and reached some agreements on the ''layoff and recall'' union proposal through counterproposal and change of position. Respondent concedes that this was movement on a substantial issue. In addition, the parties agreed to confer in the next week on scheduling further collective-bargaining sessions. Neither the Union nor Respondent, at that time, in spite of Respondent reading off items on which its position was firm, declared that the parties had reached impasse. Under these conditions of bargaining *after* Respondent read off its list of positions on which it was fixed, such progress negates an inference that both parties, considered that they were at that end of their bargaining rope. Neither party said so and the parties reached some agreement on a substantial issue. They agreed to confer to set a date for further bargaining. Under these conditions, I agree with General Counsel's argument (G.C. Br. p. 19) that there was no legal impasse at this time even if Respondent, alone, considered itself at impasse. See *Richmond Recording Corp. v. NLRB*, 836 F.2d 289 (7th Cir. 1987), and cases cited therein. Moreover, any ''impasse'' would have been the result of Respondent's desire to reach agreement only on its terms, i.e., bad-faith bargaining, and in the presence of multiple unremedied instances of bad-faith bargaining, including unilateral changes, not withdrawn. *Storer Communications*, 297 NLRB 296 fn. 7 (1989).

In addition, Respondent did not declare an end to bargaining particularly because of impasse. Rather, it referred to ''bitterness'' derived from certain other union conduct at and away from the bargaining table (residential picketing and related litigation), and the imperceptible progress at the negotiating table. Respondent complained of the ''general conduct of the Union committee'' in engaging in ''counter productive'' conduct: name calling and arguments over the union's tactic of ''accepting'' offers which the company had not made. While such conduct is or may not be conducive to swift bargaining, nothing alluded to by Respondent on this record demonstrates that the Union engaged in such misconduct as to interfere with the mechanics of collective bargaining. Forceful rejection of Respondent's offer is not a reason to suspend bargaining, neither is the hi-jinx engaged in by union bargainers.

The continued and objectionable smoking by the union's bargainers is a more serious matter. The Respondent, however, never threatened to cease bargaining temporarily until the smoking abated; rather it endured the objectionable smoking pressing on with the bargaining effort. Such conduct, I believe, injurious to health, interferes with serious collective bargaining when objected to by one of the parties on reasonable grounds. When Respondent failed to take action against this smoking, it appeared to me that it cannot

now successfully raise the issue as a reason for a cessation of bargaining, even temporarily.

Lastly, what I perceive to be the most serious of Respondent's positions, is its declaration that it wished to ''suspend'' its participation in collective bargaining as a ''cooling off period'' until resolution of the present outstanding allegations of the several complaints (G.C. Exh. 39). Respondent cites no authority sustaining that proposition. In addition, a cessation of collective bargaining coterminous with the Board's or court of appeal's resolution of the alleged unfair labor practices is a cessation of collective bargaining for an indeterminate period. Respondent's position could create a hiatus in collective bargaining, if permitted, for a period perhaps in excess of 3 years.

Where the parties have expressed a willingness to bargain and, indeed, have agreed to confer to set a date for further bargaining, and where the conduct of the parties is not so objectionable as to interfere with the mechanics of collective bargaining itself, and where there had been some minor progress on substantive issues, one party may not cease bargaining substantially on the ground that it wishes to have legal authority resolve the outstanding complaint allegations before resuming bargaining. If the conduct of the Union and the ''imperceptible'' progress were grounds for ceasing bargaining, they have not been spelled out in sufficient detail to support a cessation of bargaining. When Respondent adds to these reasons a reason which is unsupportable in both authority and usefulness (the resolution of outstanding unfair labor practice allegations), a period of indeterminate length, it is the same as stating that it wishes to cease bargaining for an indefinite period. These are not sufficient grounds in law to defend against the unilateral cessation of collective bargaining. Respondent, by refusing to bargain in this indefinite period, seems to be fulfilling the 1987, preelection prophecy of President Langston that Respondent would bargain for or 8 to 10 years before reaching a contract with the Union if the employees selected the Union as their collective-bargaining representative (in the November 1987 election).

I conclude that Respondent, commencing October 9, 1989, by refusing to bargain with the Union, inter alia, until the resolution of the instant unfair labor practice allegations, violated Section (a)(5) and (1) of the Act, as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, the Union herein, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Charging Party since November 25, 1987, has been and is the certified bargaining agent of Respondent's employees in the following appropriate unit:

> All production and maintenance employees employed by the Respondent at its Arlington, Tennessee, facility but excluding all truckdrivers, office and plant clerical employees, watchmen, guards and supervisors as defined in the Act.

4. By its written warning on or about November 15, 1988, and by its suspension on or about November 22, 1988, of its employee, Josephine Benson, because of her membership in, sympathies for and activities on behalf of the Charging Party, the Union herein, Respondent unlawfully discriminated against her because of her union activities, discouraging membership and activities therein, thereby violating Section 8(a)(3) and (1) of the Act.

5. By bypassing the Union and dealing directly with employees at a time that it was obligated to bargain only with the Charging Party; by implementing changes in its insurance plan on or about January 3, 1989, without having reached a valid impasse in negotiations with the Charging Party; by failing to meet with the Union for the period September 6, 1988, November 11, 1988, because Respondent mistakenly took the position that the parties were at good-faith impasse; by withdrawing from or repudiating its agreement on holidays, on or about November 16, 1988; by advancing irrelevant and unlawful reasons for rejecting the Union's request for dues checkoff, by suspending collective bargaining until, inter alia, resolution of the instant unfair labor practice allegations, and by its engaging in surface bargaining whereby it failed to manifest a sincere effort to reach agreement with the Charging Party except on terms unilaterally satisfactory to Respondent, Respondent violated Sections 8(a)(5), 8(d), and 8(a)(1) of the Act.

6. By failing and refusing to provide the Union, in writing with requested information regarding (a) the identities of employees and rates of pay of newly hired employees paid higher rates of pay under its interim pay plan implemented in June 1989; and (b) whether it has implemented and enforced the substance abuse plan in any of its nonunion plants, and if not why it is proposing such plan at its Arlington plant, Respondent has violated Section 8(a)(5) and (1) of the Act.

7. By unilaterally implementing its interim pay plan in June 1989, Respondent violated Section 8(a)(5) and (1) of the Act.

8. The above unfair labor practices affect commerce as alleged in the several complaints herein.

THE REMEDY

Having found that Respondent engaged in the unfair labor practices as set forth above, including bad-faith and surface bargaining, I recommend that it cease and desist from engaging in such conduct, like and related conduct, and take certain affirmative action designed to effectuate the policies of the Act. I recommend that Respondent be ordered to bargain collectively and in good faith, on request, with the Union as the exclusive bargaining representative of its employees in the unit set forth above; and in the event that an understanding is reached, to embody any such understanding in a signed agreement; and to post the attached notice. Part of good-faith bargaining is to promptly supply the information lawfully requested by the Union.

In order to ensure that the employees will be accorded the statutorily prescribed services of their selected bargaining agent for the period provided by law, I recommend that the initial year of the certification begin on the date that Respondent commences to bargain in good faith with the Union as the bargaining representative in the appropriate unit. *Overnite Transportation Co.*, 296 NLRB 669 (1989).

In addition, I shall recommend that any written warnings issued to Josephine Benson, in November 1988, be rescinded and removed and that Josephine Benson be notified in writ-

ing by Respondent of such action. I shall also recommend that Josephine Benson be made whole for any wages or other benefits she may have lost as a result of her being unlawfully suspended on or about November 22, 1988, under the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Interest shall be computed as proscribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Florida Steel Corp.*, 231 NLRB 651 (1977).

In making the findings of and remedying Respondent's unlawful acts in derogation of good-faith bargaining, violating Section 8(a)(5) and (1) of the Act, I am not suggesting that Respondent be required to offer to the Union whatever the Union wants or that any particular future Respondent proposal be condemned as per se unlawful. Thus, for instance, Respondent's bargaining with respect to the checkoff clause, at bottom, was a refusal to grant the Union's proposal of a full-blown checkoff clause on the ground that a further deduction would diminish the size of the paycheck. I have concluded that such a rationale is irrelevant and unlawful not only under Board precedent but in the full context of the bargaining. I have found that such behavior, in conjunction with Respondent's other bargaining attitudes at and away from the bargaining table shows that it was not approaching the collective-bargaining process with an aim of reaching agreement with the Union. *Overnite Transportation Co.*, supra. Having found Respondent guilty of repeatedly bargaining in bad faith, I am, in particular, not suggesting that it accede, for instance, to the Union's checkoff demand. I am recommending to the Board that Respondent's refusal may not be based on the assertions that it has so far advanced in the bargaining. I am not suggesting that Respondent be obligated to make any particular proposal to the Union or to accept any particular proposal from the Union.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[28]

ORDER

The Respondent, Langston Companies, Inc., Arlington, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally implementing any wage rate, substance abuse plan, insurance plan, or any other term or condition of employment which is a mandatory subject of bargaining without having first reached a lawful impasse with Furniture Workers Division, I.U.E., Local 282, AFL–CIO (the Union) with respect to bargaining in the unit below described, refusing to meet with the Union at reasonable times for the purpose of collective bargaining; withdrawing or repudiating its agreement on holidays reached with the Union on or about November 16, 1988, or any other mandatory terms or conditions of employment; insisting to impasse on the unilateral control with regard to any future employee wage rates or insurance plan, to change wage rates or to change the identity of the insurance carrier and to alter the details of policy coverage and claims procedures thereunder; refusing to bargain on the Union offer of a dues-checkoff provision on any irrelevant ground; and by surface bargaining without a sincere effort to reach an agreement with the Union.

(b) The unit in which Respondent is obliged to bargain collectively in good faith is:

> All production and maintenance employees employed by the Respondent at its Arlington, Tennessee, facility but excluding all truckdrivers, office and plant clerical employees, watchmen guards and supervisors as defined in the Act.

(c) Issuing warnings or reprimands to, suspending, or otherwise discriminating or retaliating against Josephine Benson, or any other employee, because she or they engage in activities on behalf of the Union, or any other labor organization, or engage in concerted activities protected in Section 7 of the Act.

(d) Failing or refusing to provide the Union, in writing, with requested information regarding: (a) the identities of employees and rates of pay of newly hired employees paid higher pay rates under its interim pay plan implemented in June 1989; and (b) whether it has implemented and enforced the substance abuse plan in any of its nonunion plants; and, if not, why it is proposing such plan at its Arlington, Tennessee plant.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole Josephine Benson for any loss of earnings that she may have suffered as a result of Respondent's unlawful discrimination against her in the suspension of November 22, 1988, in accordance with the provisions of the remedy section of this decision.

(b) Rescind its written warning of November 15, 1988, and remove from its records all memoranda of, or reference thereto, as well as Respondent's unlawful suspension of Josephine Benson on November 22, 1988, and notify Josephine Benson, in writing, that these actions have been done and that evidence of these unlawful actions will not be used as a basis for future personnel actions against her.

(c) At the request of the Union, rescind (1) the insurance plan implemented in January 1989 and any additions or modifications thereto; (2) the interim pay plan, implemented June 1989; and (3) the substance abuse plan.

(d) On request, bargain collectively and in good faith concerning rates of pay, hours of employment, and other terms and conditions of employment with the above-named Union, as the exclusive representative of Respondent's employees in the above-appropriate unit, and, if agreement is reached, embody same in a signed agreement.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its facility in Arlington, Tennessee, copies of the attached notice marked ''Appendix.''[29] Copies of the no-

[28] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[29] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

tice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.